Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

MARK E. HOWICK,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Date: Monday, February 12, 2007
Mark Edward Howick
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Telephone: 937-435-4331

Petitioner Mark E. Howick Appears pro se

QUESTIONS PRESENTED

The United States Court of Appeals for the Sixth Circuit issued an order in this case. It does not articulate a decision-making framework or contain any legal analysis. There is no reasoning provided by the court as to how it reached a single conclusion on only one issue that was fatal to this case. The court did not follow its leading case precedents, nor articulate the rationale or reasoning behind its departure from the structure in cases similarly situated. The single legal conclusion reached was that a warning was given and this case was "dismissed." The result being this case was executed.

This is a *"whistleblower"* case. The core purpose of the statute under which this case was brought was to protect the public's interest and safety. The unlawful conduct exposed put the public safety at risk. The result was civil penalties were assessed. This is a federal agency - case dismissal. The agency's administrative law judge terminated this case *sua sponta* without a hearing on the merits on the basis of a motion on a false pretense - that broke the court's own rules but was excused. The respondent's conduct for obstruction tactics was to be sanctioned. It was not. This case was terminated for a failure to prosecute in the courtroom by a Fed. R. Civ. P. 41(b) dismissal.

The dismissal of this case was in the courtroom with exhibits and books present and petitioner's counsel asking to call the first witness who was seated in the courtroom. This case challenges this federal agency's overly broad discretion powers and questions where does it overreach. It challenges this federal agency's fundamental fairness.

The case presents unique and novel agency due process issues untested and presented herein. Whistleblowers – take a unique risk in the workplace to expose those companies who break the laws and put the public safety and interest – at risk. The case reveals systemic agency failures designed to dispose of cases and *chill the industry* and must be challenged. An over-burden bureaucracy must not be the cause to force case dismissals – depriving a person of his or her day in court.

This case presents the following questions:

1. Whether an agency tribunal, as a matter of procedural, due process, and fundamental fairness has a "timely" duty to; a) trigger a Notice of Judicial Inquiry within, and b) issue an Order to Show Cause into the fitness of an officer of the court, when; 1) the agency has prior knowledge of many other instances of the attorney's misconduct, and 2) the agency filed multiple BOPR[1] complaints against the attorney, and 3) the agency is in fact in possession of the convincing evidence of the attorney's "gross incompetence"?

2. Whether a federal agency which has previously filed multiple Board of Professional Responsibility complaints against an attorney appearing before it has a duty, to disclose to party-litigants the agency complaints in a timely manner to afford fundamental fairness to the parties and to protect the integrity of the judicial system?

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[1] Board of Professional Responsibility – complaints, hereafter BOPR.

3. Whether, it is a violation of due process when an administrative law judge denies the parties of a verbatim record or transcript by a court reporter when a prehearing order may be issued pursuant to 29 C.F.R. §18.8(2)(b)(c) and a) the ALJ denied the parties request for a stenographer and b) ordered the parties not to tape record the prehearing conference as they requested?

4. In the absence of a stenographic report pursuant to 29 C.F.R. §18.8(2)(b)(c) or a verbatim record of a prehearing conference where an administrative law judge contradicts himself [on the record] regarding what was ordered by the ALJ and the parties have a different interpretation, does a party have a reasonable opportunity to obtain time in which to respond and comply where there is no verbatim record?

5. Does a single judicial warning alone satisfy the *Link* dismissal standard and must it be court ordered by clearly articulated standards?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark Edward Howick appears before this Honorable Court as a pro se party. I respectfully petition this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Petitioner's Application For an Extension of Time Granted by This Honorable Court

The Petitioner's Application to Extend Time was timely submitted to the Court on December 01, 2006 demonstrating jurisdiction and good cause and was extended by Justice Stevens to and including February 12, 2007. It is reproduced at App. 1. The United States Court of Appeals for the Sixth Circuit order is unreported denying panel rehearing and a petition for suggestion for rehearing *en banc.* It is not published in the Federal reporter, but was entered on September 15, 2006 and is reproduced at App. 2. The additional unreported order of the United States Court of Appeals for the Sixth Circuit affirming the United States Department of Labor's Administrative Review Board's final decision and order was filed on May 03, 2006 and is reproduced at App. 4 to 10. The federal agency's underlying final decision and order of the United States Department of Labor's, Administrative Review Board, which was *untimely* issued, is reproduced and affixed at App. 11 to 28. The ALJ's RD&O is reproduced at App. 29 to 81. The ALJ's relevant orders are reproduced at App. 82 to 90. The jurisdiction of this Court was established in the application filing, as invoked under 28 U.S.C. § 1254(1).

STATEMENT OF JURISDICTION

The unreported order of the United States Court of Appeals for the Sixth Circuit, denying panel rehearing and a petition for suggestion for rehearing *en banc* was entered on September 15, 2006 and is reproduced at App. 2. The unreported order of the United States Court of Appeals for the Sixth Circuit affirming the United States Department of Labor's Administrative Review Board's final decision and order was filed on May 03, 2006 and is reproduced at App. 4 to 10. The federal agency's underlying final decision and order of the United States Department of Labor's, Administrative Review Board, which was *untimely* issued, is reproduced and affixed at App. 11 to 28. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution privides, in relevant part:

> . . . No state shall deprive any person of life, liberty, or property, without due process of law; . . .

Congress enacted *Motor Carrier Employee Whistleblower Protection* of the Surface Transportation Assistance Act [herafter STAA] to combat "the increasing number of deaths, injuries and property damage" resulting from commercial trucking accidents.*Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258, 107 S. Ct. 1740, 1745, 95 L.Ed.2d 239 (1987) (quoting 128 Cong. Rec. 32509, 32510 (1982)). The STAA makes it unlawful to discriminate against an employee who has made complaints regarding violations of commercial

vehicle safety regulations. 49 U.S.C.§ 31105(a)(1)(A). The STAA makes it unlawful to discharge or discriminate against an employee for refusing to operate a commercial vehicle in violation of federal commercial vehicle safety regulations, or due to reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition. 49 U.S.C. § 31105 (a)(1)(B). *See* (App. 91 and 92)

The Toxic Substance Control Act contains specific statutory language giving the Secretary of Labor the discretionary power to award exemplary damages in appropriate situations. TSCA 15 U.S.C. § 2622(b)(2)(B). A party aggrieved by the final decision of the Board may petition for review in the United States Court of Appeals for the circuit in which the alleged violation occurred or in which the petitioner resided on the date of the violation. 49 U.S.C. § 31105 (c).

29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges: Pertinent Procedural Rules – *See* (App. 92-96)

STATEMENT OF THE CASE

A. **Protecting the Public Interest and the Public Safety. Blowing-the-Whistle On Unlawful Conduct.**

The 2002 Olympic Torch Relay was *"the largest marketing initiative in General Motors history . . ."* (R.47: CX-34) for the Chevrolet Division of General Motors and Campbell-Ewald Company proclaimed by *Event Marketer Magazine* June/July 2003. Special Report: The 2003 EX AWARDS: Contents page-7 at 47: The Grand EX Winner "Strategically, it was huge. Logistically, it was nearly impossible.

General Motors' largest marketing initiative ever used every event marketing tool in the box to drive Chevrolet's sponsorship of the Winter Olympics across 14,000 miles in 46-states over 65-days." The front cover feature bills the event "Fired Up - An Event of Olympic Proportions." (R.47: CX-34) June 10, 2002, the premier advertising trade magazine *Advertising Age* Reported "GM EYES CHEVY FOR LEAD OLYMPIC ROLE" - "GM paid $900 million to be the exclusive domestic car and truck sponsor of the U.S. Olympic Team from 1998 through 2008." (R.60:pg.7,CX-22 / R.111:CX-12 0490) There is no reason whatsoever that the 2002 Chevrolet Olympic Torch Relay could not operate in compliance with Federal Motor Carrier Safety laws.

C-E's Senior VP and General Counsel Louis H. Bridenstine Jr. told the Federal Motor Carrier Safety Administration ("FMCSA") "Campbell-Ewald, an advertising company, does not typically employ drivers of Commercial Motor Vehicles in its regular course of business." (R.47: CX-Z 0514 / R.111: CX-15 pg.2 / R.60:pg. 8, CX-28) Campbell-Ewald is a licensed motor carrier with the United States Department of Transportation and operates commercial motor vehicles under US DOT # 865649. (R.47:CX-5A, Bates:003 and 005 / CX-1E / R.111:CX-15 pg.1) Craig Conrad, Senior Vice-President (R.66: pg.3,22-23) for Campbell-Ewald oversaw the Olympic Torch Relay (hereafter "OTR") program. (R.66:pg.4) Mr. Conrad testified he was the liaison for C-E with Chevrolet and that the Chevrolet brand paid $7 million for the Salt Lake OTR. (R.66: pg.7,at 23) The 2002 OTR traveled 13,500 miles, in 46-states, in 65-days. (R.66: pg.17) Mr. Conrad stated "no matter how many times I see the flame, I still get goose bumps." The 65-day event required many 18-hour days and sleepless nights. (R.47: CX-1F-1 / R.60: pg.4) The award winning Chevrolet Olympic Torch

Relay "failed to randomly test for controlled substances and/or alcohol" an "Acute" FMCSA safety violation (R.47:CX-1E,pg.4&11). It also violated numerous other FMCSA safety violations that were "critical". (R.47:CX-1E,pg.6) The FMCSA proposed safety rating based upon this compliance review was "UNSATISFACTORY". A "Notice of Claim – Violations of 49 C.F.R. § 382.305 for Civil Penalty was accessed by the United States Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA) for the amount of $3,000." (R.47:CX-1E,pg.12) Also *see,* FMCSA Safety Management SEA Report. (R.47:CX-1D) The USDOT/FMCSA validated the allegations in my complaints as factual. (R.47:CX-5A, Bates pgs.1-7) The USDOT document Safety Management SEA – Latest SafeStat Results dated March 23, 2002 for US DOT #: 865649 Carrier Name: CAMPBELL-EWALD documents (acute/critical) violations.

It is important to point out on the USDOT generated documents: Latest SafeStat Results: September 22, 2001, [printed from the USDOT website on 3/22/2002] bottom section "Driver OOS Inspections with Driver OOS Violations" show FMCSA violations and inspection dates 2/28/2000 through 7/18/2001 with seven separate incidents of violations noted, in seven states throughout the United States. Campbell-Ewald broke the law with violations of FMCSA safety violations two years prior to my "blowing the whistle" with the same type of unlawful behavior. This is a factual documented pattern of unlawful conduct on eight separate occasions of FMCSA safety violations proven by the USDOT's documents. (R.47:CX-5A, Bates pgs.05-6)

C-E's Senior VP and General Counsel Louis H. Bridenstine Jr. represented to FMCSA on April 29, 2002 that "Campbell-Ewald does not dispute the violations cited in March 20,

2002, compliance review. Campbell-Ewald, however, did not knowingly allow any of these violations, including the critical and acute violations, to occur. It simply was not aware that it was not in compliance with FMCSA regulations." (R.47:CX-27,pg.2/R.111:CX-15,pg.2, at 0514) The USDOT's own documents are proof to the contrary. (R.47:CX-5A, Bates 05-06). C-E's legal counsel, Mr. Batten, represents to OSHA "It seems incredible that the tour could have been disregarding federal safety and DOT driving regulations without some prior attention." (R.47:CX-2A,pg.5,5-6) "We believe Mr. Howick's allegations to be totally without merit, and ask that his complaint be dismissed." (R.47:CX-2A,pg.5,8-9) The respondent exercises their influence to persuade dismissal of this case. The substantial evidence above supports my whistleblower safety complaints, found to be "meritorious" by the FMCSA.

My FMCSA safety complaints to C-E management, co-workers, were with frequency and almost daily and were protected activity. Some complaints were to outside authorities. My other safety complaints made to Campbell-Ewald's management staff are best capsulated in OSHA's Final Investigative Report (R.2: pg.3,¶1,-pg.6) and in my written complaint dated April 29, 2002, and document by OSHA May 6, 2002. (R.1:) My public safety concerns and complaints regarding "propane tanks" being transported, stored, and placed, are well documented from the beginning of the OTR and in this complaint. "Specifically, managers would not enforce the smoking policy as employees were permitted to smoke near flammable and combustible materials."[2] (R.2: OSHA Report,pg.3,¶1) Public, employee,

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[2] The other health, safety, and policy issues which C-E's management failed to enforce on the OTR tour, is illustrated in Jack Maxwell's January 28, 2002 Memorandum to John Schroeder. (*See* CX-Y;1-18)

and personal safety were my concern. The "propane tanks" were transported through both the Baltimore Tunnel and Lincoln Tunnel into New York City under the direction of Campbell-Ewald's management shortly after 911. C-E's OTR commercial driver Randall L. DeBerg provided a sworn declaration to these facts. (R.34: pg.3, Nos. 14-15 / R.47:CX-1B / CX-1G / R.87:) Philip A. Rodriguez, a retired Los Angeles Police Detective, who was GM security on the OTR also provided a sworn declaration regarding "propane tanks" and one incident with the "propane tanks catching fire." (R.40:CX-3C,pg.2, No.6) [3]

Petitioner was "hired" by Campbell-Ewald on October 30, 2001 as a commercial driver for the Olympic Torch Relay. I was told the reason was that I was one of the best-of-the-best. Craig Conrad SVP-Brand Management Supervisor for the Olympics November 2, 2001 letter of C-E OTR Team Member Training and Orientation materials stated, "You are about to embark on one of the most challenging events of a lifetime and C-E is glad to have you on our team." (R.47: CX-5A, Bates 049, ¶ 1) Mr. Conrad testified in his deposition that he was sure that the phrase the "best-of-the-best" is used quite often with Chevrolet and was used in orientation to tell employees why they were there. (R.66:,pg.42,19-24) "Campbell-Ewald takes its commitment to providing a safe and secure environment for its employees and guests very seriously." (R.47: CX-5A, Bates 050, ¶1)

However, Mr. Conrad testified that the Olympic Torch Relay did-not have a safety director. (R.66:pg.27,18-22)

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[3] Other safety complaints regarding "smoking and alcohol" issues are well documented. (R.1: Complaint R.2: OSHA Report, pg.5,¶ 4, R.47:CX-Y)

Campbell-Ewald "discharged" me and publicly "fired" me on January 11, 2002. (R.1:pg.55: R47:CX-5A,Bates 0190) On January 15, 2002, I filed oral complaints with OSHA regarding "safety hazards in the booth and set up areas," unsafe and unhealthy working conditions, safety concerns with propane tanks being transported, stored and placed inside a building, and managers would not enforce the smoking policy, allowing employees to smoke near flammable and combustible materials, and that Campbell-Ewald discharged me in violation of both Section 11(C) of the OSH Act, 29 U.S.C. § 660 (c) and the employee protection provisions of the STAA. (R.2) As noted above, "Odorized Propane" used in the booth and display areas, and an incident with the propane catching fire, was the first issue presented and documented by OSHA. (R.2: R.47: CX-1A) The propane in general was a constant safety issue raised from the beginning of the OTR, as sworn to in my deposition (R.82:pg.372) and in more detail at pages 372-377.

After I was fired, I filed a claim for unemployment compensation benefits with the State of Ohio. The State of Ohio's Findings are of record.[4] (R.47:CX-7/R.60:CX-7) On September 27, 2002, After drafting a settlement agreement during the investigation, OSHA recommended that Howick's complaint be dismissed. (R.3:) Howick timely objected to OSHA's determination on October 30, 2002. (R.5:)

After I was publicly fired by Campbell-Ewald for not being a "team-player," C-E's Human Resources payroll

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[4] State of Ohio Findings: Reason for Separation: Discharge – Claimant was discharged from employment with Campbell-Ewald because of alleged insubordination. "A review of the facts establishes that there was not enough fault on the part of the claimant in his/her acts, omissions, or course of conduct that an ordinary person would find the discharge justifiable." (R.47:CX-7/R.60:CX-7)

department, "reversed" my direct deposit personal payroll wire transfer, causing bank overdraft fees and eventual closing of my bank account. This act by C-E caused economic and financial hardship. My bank account was referred to a collection agency. (R.47:CX-4B,pgs.1-4) After I was fired by Campbell-Ewald I was blocked from running the Olympic Torch in Seattle, Washington and threatened with arrest in the parking lot of a Chevrolet dealership by GM security under the direction of C-E management. (CX-Y:1-18,pgs.15-17/R.40:CX-3C) During this distressed situation a Cincinnati attorney attempted to assist me (R.82:pg.379,6-9,pg.380,3-8) and proposed a compromise to C-E to reconcile the situation. (CX-Y,pg.17) C-E's proposal was a quid pro quo;[5] *see* footnote – 5. During OTR training in C-E's corporate facility all OTR team members were promised that each person would get to run the torch. (R.82:pg.386,1-9) Also after Campbell-Ewald fired me, they would attempt to obtain a "gag-order" against me to prevent me from "communicating with the public". (R.75:pg.2,¶2, at 3) No apology has been extended from C-E [6] or Chevrolet.

The *prima facie* elements of an STAA whistleblower case had been met. OSHA also found the prongs of the STAA test had also been met. C-E management had knowledge. "He [Howick] was informed that provided evidence did support that management had knowledge of his activities and that he suffered an adverse action." (R.2:pg.5, Closing Conference ¶3, at 2-3 / R.46; R.47).

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[5] Campbell-Ewald's obstruction tactics were initiated at the beginning of this case in bad faith and noted. C-E's quid pro quo to a different attorney assisting me at the time while I was in Seattle was that I was "offered to run the Olympic Torch . . . if I dropped my OSHA complaint."

[6] Campbell-Ewald Advertising after violations of federal safety laws still remains a federal government contractor for the United States Postal Service and the United States Navy.

B. Factual and Procedural Background

The facts and procedural background of this federal agency case remain in dispute. The facts and challenges to agency due process and procedures in this case has been consistently challenged from the forefront.

They are challenged herein for resolution by this Court. This case seeks clarity and uniformity of the law. This case has a substantial record and is fact intensive. Extraordinary circumstances exist due to family health issues and economic hardship, an attorneys' father's death during prosecution of the case, and the petitioner's attorney's gross incompetence. Furthermore, the trial court's conduct was abusive and hostile. It must be reviewed. The lower courts have overlooked these elements and conditions. The Sixth Circuit Court of Appeals failed to review and resolve the issues presented and the questions presented. [emphasis added] *See* App. 96-97. This case rises from the lower court's failure to resolve the issues presented and to articulate a legal approach and provide an legal analysis that people can understand. Nor is there a method of reasoning and logic as to how this court issued the order one one issue – terminating this case. Had the lower court done so, it would have changed the outcome and result. The lower court's order is devoid. It is absent a written approach, written legal analysis, written application of circuit case law and consideration and application of the extraordinary circumstances. The issues were forcefully arguged, but ignored by the lower court. The lack of resolve below by lower courts, elevates this case up to this Court.[7]

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[7] The ALJ first ordered "more" time to be taken in this case and to waive time constraints and to provide answers to his November 18, 2002 prehearing order. (R.7) C-E did not provide an answer or comply with the prehearing order. (R.8) It is noticeably absent from the agency's docket sheet and certified list. C-E was in default and did not comply.

With respect to judicial economy, I will agree in principle as to how the Sixth Circuit frames the background of the case in *Howick I* in general terms and direct the Court's attention to App. 4 to10 and with notable exceptions to App. 11 to 16. I beg the Court's indulgence to grant the petitioner's accompanying application to review the original certified record from the agency. This petition does not typically seek to right all the wrongs in this case but there are disputed facts unresolved. This case seeks clarity in the law in several areas.

C. Disputed Facts and Procedures in Controversy.

There remains specic facts in this case which have yet to be resolved. Doing so would produce a different outcome. Specifically, there are challenges to the ALJ's characterization of off the record prehearing conference calls; which occured without a verbatim transcript. The ALJ's individual procedures off the record, are also in controversy and disputed. The totality of the disputed facts and circumstances are too voluminous to burden this petition. The issues have been forcefully raised. For example: " . . . [t]heir causing delays . . ." *See* App. 22. The ALJ found that Howick and his counsel's "[t]heir causing delays . . ." of the proceedings and engaged in malfeasance. However, the record reflects that the hearing was delayed several times at the requests of both parties. While discovery responses were delayed by both parties, and Howick's deposition had to be continued several times, there was no malfeasance. My delays were for good cause, a) having to care for my parents, as my father was in intensive care in critical condition, b) the unexpected death of Mr. Slavin's father, and c) my own health problems and with a medical operation procedure scheduled. This does not qualify as malfeasance. A reasonable person would not construe them as "[c]ausing delays . . .". The agency argued that the board's perception of

my statements-of-reasons in support of my arguments were excuses. However, until the case was dismissed the ALJ clearly articulated his conclusion which is in stark contrast to the agency's after the fact characterization. "The undersigned does not dispute the veracity of Complainant's and counsel's accounts of personal tragedy . . .". (R.58:pg.4¶3,at 2-3) No reasonable person could agree with logic and reasoning that based upon the occurrences of; 1) family health, hospitalization, and rehabilitation, caring for my father 2) the death of an attorney's father, 3) a doctor ordered operation and medical procedure, would use these as building blocks for a pattern of delay. Certainly not a reasonable conclusion to *"[t]heir causing delays . . ." quoting* pertinent part (R.123:pg.8). The logic and reasoning is flawed. Documents confirming the communication referenced [App. 22] is in the certified record with redundancy. I personally witnessed it at the Sixth Circuit records department, including exhibit books, marked, indexed and the exhibits were previously exchanged. The depositions prove the exhibits were used and the trial transcript proves they were in the courtroom. *See* App. 48 to 58. Ultimately, the exhibits are on the agency's certified list of the record and in the agency's original record. [*emphasis added*] Additionally, petitioner's attorney attempts to call the first witness seated in the courtroom. *See* App. 55 and 60. Furthermore it must be noted; previously quoting ALJ Phalen *"Even though Complainant's motion for partial summary judgment is denied, the undersigned finds that the Respondent has not contested the issues . . ."* (R.58:pg.4)

Rearguing the petitioner's motion for a partial summary judgment was not malfeasance but zealous advocacy. All parties and exhibits were in the courtroom ready to proceed to trial. A full and fair reading of the full court transcript proves this. Rule §18.47 – Exhibits [App. 96] (b) states one copy must be furnished . . . not on a moments notice,

multiple copies. Even opposing counsel did not know how the ALJ wanted things done absent a clearly written prehearing order and statement with regard to the issues:

> JUDGE PHALEN: I'll give you a standing objection to characterizations. All we want to hear are the titles of exhibits. For instance, 3(a), establishing black listing. Well, that's not a legitimate statement and that's my example. All I want is the identification of the document, and that's what I'm taking your no objection to be. MR. BATTEN: Right. And, Your Honor, with respect to the statements, for example, I submitted a statement as well. I didn't mark it as an exhibit. I don't think that -- I don't know how Your Honor wants statements presented. He presented a statement and I'm -- (R.68:Tr.pg.24)

Mr. Batten did not know either how ALJ wanted things done. No written prehearing order articulated that. This calamity was open to everyone's different interpretation . . . which changed on a moments notice and with the ALJ's stop watch.

> JUDGE PHALEN: Right now. Right now. Right at this moment I want to see the copies that I have, and I want to see the copies that Mr. Batten is supposed to have. Get them to him. (R.68:Tr.pg.33)

It was previously proven the ALJ had an Exhibit Book on the corner of his bench. [App. 50] Nevertheless, he was demanding multiple copies. It is also noteworthy and to an extreme that pauses and delays of several minutes were being timed. [App. 80] This is unreasonable. Absent a written and clearly articulated prehearing order and detailed statements specifically addressing these issues, it would only be fundamentally fair to allow for a reasonable amount of time in an to attempt to rework and reassemble an additional group of documents and exhibits. How does a person comply with an order that does not exist? The trial judge clearly

abused his power and discretion denying a reasonable opportunity to do so. This situation is grossly unfair and against the principles of fundamental fairness. The result was the execution of this case for failure-to-prosecute under a Fed. R. Civ. P.41(b) dismissal as evidenced by the following transcript excerpt:

> MR. SLAVIN: We are ready, Judge. We also ask --
>
> JUDGE PHALEN: I am stating to you that my observation is that you are not ready to proceed.
>
> MR. SLAVIN: We are.
>
> JUDGE PHALEN: Listen, this is a ruling.

(R.68:Tr.pgs. 51-52)

REASONS FOR GRANTING THE WRIT

D. Extraordinary Circumstances Existed That Was Not Considered by the Sixth Circuit or the Agency.

Warning an incompetent attorney . . .

The agency had prior knowledge of the petitioner's attorney's gross incompetence. The agency was dilatory and derelict in its responsibilities and duties to timely trigger 29 C.F.R. § 18.34(g)(2) hearings in each agency case. [8] **The attorney was not in good standing.**

The federal agency's failure damaged - the people.

Administrative Notice was taken in the "Judicial Inquiry" which occurred in the mid-1990's. However, these instances were the subject of a referral by the DOL Chief

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[8] *In the Matter of the Qualifications of* EDWARD A. SLAVIN, JR., (USDOL) OALJ (2004-MIS-2).

Administrative Law Judge to the Board of Professional Responsibility of the Tennessee Supreme Court in December of 1998. "The Tennessee Supreme Court only recently heard oral argument from an appeal by Slavin of a three year suspension imposed by a Tennessee state court judge, which is partly based on the Chief ALJ's complaint. *See Board of Professional Responsibility of the Supreme Court of Tennessee v. Slavin,* No. 154861-3 (Dec. 2002). Moreover, the instant Judicial Inquiry was prompted in large part by the cumulative effect of Slavin's conduct over time,[9] *(my emphasis)* although the proximate event was Slavin's conduct in his representation of Somerson. The question presented is by virtue of the fact that the agency's process took an excessive amount of time to act alone, which apparently the agency has the inherent authority to do so, did the agency's dilatory failure to act in a timely manner cause further harm to Slavin's clients, opposing parties, and the judicial system? (*Id.* pg. 126) Judge Burke wrote in the case

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[9] In the agency's - ARB Case No. 04-088 *In the Matter of Qualifications of* Edward A. Slavin, the board wrote, "In addition, an Appendix citing additional instances of questionable conduct accompanied the Notice. The Appendix listed "**more than forty instances**" (my emphasis) where presiding officials had documented Mr. Slavin's conduct in connection with his representation of parties before the OALJ, the ARB, and state and federal courts. ALJ Exh. 32-C at 6-14. The Notice advised Mr. Slavin that Judge Burke would take official notice, pursuant to 29 C.F.R. § 18.45, of the findings of the various tribunals contained in the Appendix. *Id.* at 4." The agency in fact had "prior knowledge" that Mr. Slavin was "not" in good standing within its own tribunal upon his entry of appearance in my case. Therefore the ALJ had a "duty" to qualify or disqualify Mr. Slavin and trigger a 29 C.F.R. § 18.34(g)(2) hearing. Moreover, Slavin's inability or unwillingness to file pleadings in compliance with straightforward ARB pleading requirements "illustrates gross incompetence." These findings merit disqualification under 29 C.F.R. § 18.34(g). " (my emphasis added). The agency failed to protect the integrity of their own judicial system which serves the people.

above in the heading; "Client's case or appeal dismissed because of Slavin's actions" (pg.3, 25-29) and concluded; "I find that the ALJ's decision in Case No. 2003-STA-6 provides clear and convincing evidence that Slavin violated MRPC 1.1 (lack of competent representation), MRPC 3.5(d) (conduct intended to disrupt a tribunal), and MRPC 8.4(d) (conduct prejudicial to the administration of justice)." Of the nine (9) case Judge Burke lists in this category the petitioner's case *Howick v. Campbell-Ewald Co.*, 2003-STA-6 (ALJ Sept. 18, 2003) (*Id.* Pg..3, 25-29) is listed first. This demonstrates that this case has extraordinary circumstances.

This case presents a novel question to be resolved by this Court. The *Link* Court certainly did not have to consider or address this unique element nor the novel question presented here to this Court. This case presents a far more complicated question to this Court for resolution. The *Link* precedent of some forty-four years ago must be revisited given today's more complicated circumstances. Specifically, in those cases and in this one holding *Link* as the foundation. *Link* must be revised. The case at bar presents unique facts and circumstances the circuit court did not consider or resolve. The lower courts did not address the issues or articulate the departure from case precedent and the standard of review. A person's fundamental right to his day in court must not be executed by the sole descretion of a single judge, without a rigid test and without reasonable judicial checks and balances that a reasonable person and average American person can understand. There are significant dissenting opinions in the circuit courts below and a split in the analysis framework.

For example in the Seventh Circuit case *Rice v. City of Chicago,* 333 F.3d 780 the court recognized the dilatory tactics and disobedience of the opposing party with an analysis of the conduct of the parties. A similarity in *Rice* to this case is Campbell-Ewald does not have clean hands here.

E. The ALJ and Agency Failed to Follow Their Own Rules; 29 C.F.R. § 18.8 and Ordered the Petitioner Not to Record Prehearing Conferences Depriving The Petitioner of Verbatim: True and Accurate Record. – This Violates and Denies Due Process.

On September 9, 2003 the hearing before the ALJ began with a review of preliminary matters. The ALJ begins the trial by; "All right. We had an extensive prehearing conference at which a number of matters were determined, and I'm going to attempt to give you a summary pursuant to 29 C.F.R. Sections 18(a), (b) and (c). As I stated, there was not a stenographic recording or court reporting of that proceeding. The reason was I chose not to do that. I received no requests and, therefore, that is how I proceeded as is my practice." (R.68:TR.pg.5, at 17-23) The ALJ is factually wrong. Previous requests were made and in the record. The ALJ notes . . . "the undersigned noted that there was no request." *See* App. 46-47. The morning of the hearing the ALJ can not remember that several requests were made and then contradicts himself . . . This happens numerous times. Again, in fact the requests were made. (R.74:pg.10,¶1) and (R.93:pg.3, at 5.(a)) The recap of partial matters discussed in the prehearing conference was seriously deficient. The August 29, 2003 order stated that "the undersigned will rule on any discovery related objections as they arise in the normal course of the hearing . . ." (R.58:pg.8,¶1 at 1-2) and attorney Slavin was denied of doing so. Quoting the ALJ pertinent part ". . . and I want no more fooling around with concepts of discovery belatedly here." (R.68:TR.pg.16, at 8-9) Additionally, I will point out that opposing counsel corroborates these facts in the intervenor's brief filed with the circuit court August 4, 2005 at page 28. Campbell-Ewald

intervenor writes in their brief filed at the Sixth Circuit, "The prehearing conference was conducted on September 8, 2003. Counsel for petitioner asked if the conference was being transcribed by a court reporter, and when the ALJ informed him that it was not, and that nothing in the regulations required it to be transcribed, counsel for the petitioner requested permission to record the call, which was denied." (*Id.* At 10) Brief of Intervenor (pg.28)

F. Off The Record Conditions - Were Hostile.

The ALJ's admonitions were erratic, often contradictory, and at times unnecessarily derogated the parties. (R.74:pg.10, footnote 4) The Manual for Administrative Law Judges provides guidance and ground rules, specifically regarding Judicial Attitude, Demeanor, and Behavior. (Pgs.104-108) The off the record "conditions" created by the ALJ in this case were threatening and intimidating. Attorney Slavin verbatim "accurately" documents ALJ Phalen's intolerance specifically with regard to the parties' needs for a **"motion to compel",** *quoting* ALJ Phalen; "*if you file a motion to compel, you'll come here to my office in Cincinnati, with little or no advance notice, and it will be on the record, and it will not be pretty.*" (R.93:pg.3,5.(c)) There was no ambiguity in the statement. It was threatening. The result was that no motions to compel productions were filed in this case for the reason above, as the on going discovery disputes demonstrate there was a need. *See* App. 88. It is also significant to note, that opposing counsel who was a party to the prehearing conference calls and has firsthand knowledge of the episode has never disputed the accuracy of the exact quotes, nor disputed the characterization of the ALJ's hostility. *See* App. 79, endnote 4. The history and circumstances between the

agency and attorney Slavin created a hostile environment and aggravated the circumstances and conditions of this case. *See above In the Matter of the Qualifications of Slavin* USDOL-OALJ 2004-MIS-2 and ARB Case No. 04-088.

G. Sixth Circuit's order creates a division among the Federal Circuit Courts of Appeals on an important issue of federal law and the breadth of this case has potential impact on many people.

The Sixth Circuit's fatal act to this case is a single warning. The court fails to articulate the specific act. The court also fails to present what the court claimed as full consideration to any other perceived warnings and whether there was a *"reasonable opportunity"* to comply. The court cannot now go back and say there was more than one that was fatal to this case. Nevertheless, the court fails to specifically articulate one, other than one warning is the court's conclusion to hold a Rule 41(b) dismissal.

The Second Circuit in *Lesane v. Hall's Security,* 239 F.3d 206 addresses a Fed. R. Civ. P. 41(b) dismissal for failure to prosecute but provides a full legal analysis and method of reasoning which resulted in the case being reversed. *Link* is also the bedrock of this case. A similarity in the instant case as in *Lesane* is that I also initially appeard *pro se* and would ultimately have to appeal *pro se* due to the extraordinary circumstances in this case. In *Lesane s*everal warnings were also issued. Plaintiff made no reply of any sort, and the district court dismissed plaintiff's case with prejudice. In the Second Circuit's discussion the court stated "Although the text of Fed. R. Civ. P. 41(b) expressly addresses only the case in which a defendant moves for dismissal of an action, it is unquestioned that Rule 41(b) also gives the district court

authority to dismiss a plaintiff's case *sua sponte* for failure to prosecute, *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962)." A rare element and distinction in the instant case is that the defendant's motion-to-dismiss broke the court's own rules but was excused and allowed to stand.[10] Furthermore, it was predicated upon a false pretense that was challenged at the trial court level which the trier of fact failed to resolve. In *Lesane* the court continues . . . At the same time a Rule 41(b) dismissal remains "a harsh remedy to be utilized only in extreme situations." *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972) (per curiam). And pro se plaintiffs should be granted special leniency regarding procedural matters. *Lucas v. Miles*, 84 F.3d 532, 535 (2d Cir. 1996). The Second Circuit continues . . . Finally, "this court has repeatedly detailed factors . . . to be considered before dismissal for failure to comply with a court order," and these factors significantly cabin a district court's discretion under Rule 41(b), so that "deference is due to the district court's decision to dismiss a pro se litigant's complaint only when

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[10] The agency makes exceptions to the rules for the Campbell-Ewald the Intervenor; specifically regarding the respondent's "Motion to Dismiss" that ultimately was fatal to my case. C-E's motion violates the agency's own rules, but is arbitrarily excused:

> [1] Counsel for Complainant raises an objection under 29 C.F.R. § 18.3(f)(6) to Respondent's filing of a motion to dismiss by facsimile that exceeded the allowed 12 pages. The undersigned excuses Respondent's violation of § 18.3(f)(6), the filing of a 20 page motion to dismiss when all documents were included. It is ironic that the document submitted by counsel for Complainant raising the violation of § 18.3(f)(6), was itself in violation of §18.3(f)(4) and (7) because it was transmitted without a cover sheet and it was received at the Office of the Administrative Law Judges after 5:00 pm. The undersigned also excuses Complainant's violations. (R.58:pg.6, footnote-1)

the circumstances are sufficiently extreme." *Id.* (my emphasis added) Sufficiently extreme . . . must require a rigid test.

Specifically, a district court contemplating dismissing a plaintiff's case, under Rule 41(b), for failure to prosecute must consider: "[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and [5] whether the judge has adequately assessed the efficacy of lesser sanctions." *Alvarez v. Simmons Mkt. Research Bureau, Inc.*, 839 F.2d 930, 932 (2d Cir. 1988)

The court begins their consideration . . . with a detailed approach to the case and the issues presented with an articulated legal analysis and method of reasoning. The court also recognizes "Furthermore, notions of simple fairness suggest that a *pro se* litigant should receive an explanation before his or her suit is thrown out of court." *Lucas,* 84 F.3d at 535. That said, the court performed an analysis the lower court did not. Expressly and in comparison, no analysis is provided in the instant case by the Sixth Circuit. The Second Circuit in doing so "placed the given the circumstances of the case" which is a significant distinction of how the law and tests were not applied to the instant case, and then that court applies particular emphasis on the fifth and final factor. The Sixth Circuit failed to apply its leading case precedents and framework of *Wu, Mulbah, Carter, Knoll, Nationwide, Cox, Hickman* to my case, as the court did in other similarly situated cases. [my emphasis added] Additionally, there are not significant gaps of time or inactivity in the agency's docket sheet or certified record in my case. Due to the

unusual circumstances of my family health issues, economic hardship, and the death of my attorney's father, all of which are amply in the record perhaps the prosecution was less than ideally efficient. But, one must remember the ALJ 'ordered' to take more time. The agency's overall record regarding attorney Slavin proves that he was consumed with agency complaints. Even in *Lesane* the court recognized "Especially when a *pro se* plaintiff who likely lacks the professional and institutional support of a paid advocate is involved, such tardiness does not much weigh in favor of the dismissal with prejudice." The Second Circuit also specifically sets out and addresses the warning . . . in *Lesane,*

"Second, although the district court did issue an order stating that if it "receive[d] no submission from plaintiff by . . . the Court [would] dismiss this case pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute," . . . and although we have remarked that "it is difficult to imagine" how a dismissal following an unheeded warning could be an abuse of discretion, we do not find, in light of the other features of this case, that the presence of the warning requires that we affirm. Quite apart from the fact that none of the five factors is separately dispositive, *Nita v. Connecticut Dept. of Envtl. Protection,* 16 F.3d 482, 485 (2d Cir. 1994), we note that the warning the district court issued was brief and technical, compassing little more than the quoted phrase. We note also that this feature makes the warning stand in stark contrast to the descriptions the district court issued to plaintiff, in the same order, to indicate the appropriate nature and content of what was being instructed to be filed. These were full and used ordinary language and commonplace examples to explain what was needed. A clear distinction to this case, where the prehearing

conference was not transcribed pursuant to Rule §18.8(2)(b)(c). [App. 94-95] and exactly what was needed – was unknown to all parties and changed by the minute.

Next in comparison and applying the Second Circuit's third factor to my case: [3] whether the defendant is likely to be prejudiced by further delay; that argument by the agency or Campbell-Ewald cannot be persuasive. There was no delay as this case was dismissed - standing in the courtroom. (*emphasis added*) Therefore, this factor and the subsequent arguments [after the fact] are moot. The trial court failed to address and resolve the issues of prejudice which mostly disadvantaged and prejudiced me. The ALJ just failed to act. Campbell-Ewald failed to produce documents in discovery from the beginning to the end.[11] The clear and convincing evidence in the record proves that C-E's delays prejudiced me and aggravated my financial hardship. It was especially financially burdensome on me as I had to bear the exceptional economic burden after suffering the initial financial hardship to travel to Detroit, Michigan for my deposition and to conduct the ten [10] interviews as ordered by the ALJ. This undoubtedly increased my material cost of litigation. The ALJ ordered ten [10] but Campbell-Ewald

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[11] The ALJ stated in the courtroom and on the record; "I did want to note that I did criticize Campbell-Ewald for not leaving the documents with the Claimant at that time . . ." *quoting* pertinent part. (R.68:TR.pgs.6-8) The obstruction issues are discussed in great detail throughout the briefs and in the record. The morning the case was dismissed the ALJ concludes the summary of the discover abuses and issues by C-E: JUDGE PHALEN: "Mr. Batten, I want you to address the matter of sanctions, and why documents were not produced by the original discovery cut-off date, by the final discovery cut-off date, and by today's date." (R.68:TR.pgs.56, at 3-6) / *See* App. 82 to 90.

demonstrated their bad-faith tactics and dominated the daily clock to only allow one [1] out of the ten ordered and refused to agree to accommodate our staying in Detroit to take them as ordered and refused to allow them on Saturday or Sunday as we stayed in Detroit for that purpose. The ALJ took no action. There is clear and convincing evidence in the record – the merits of this case were locked in a vacuum of procedural unknowns. Simply put, in my case the ALJ kept moving the goal lines, favoring the respondent's obstruction tactics.

The Second Circuit's fourth factor: [4] whether the district judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . as applied in the instant case, a fair and reasonable person would also deem this element moot and unpersuasive. Again, I must re-emphasize that all the parties were in the courtroom ready to proceed. Any consideration and arguments to that effect presented now, given to the court's calendar congestion - is looking backwards and writing backwards.

These efforts and arguments are transparent. Their intent is only an attempt to justify the dismissal – after the fact. There was no calendar to protect - standing in the courtroom looking forward to prosecuting the case. Protecting the judicial integrity – while standing in the courtroom with exhibits, witnesses, and asking to call the first witness . . . must in this context supported by the facts and circumstances in this case be to . . . protecting a party's right to due process and a fair chance to be heard . ." [*emphasis added*]

Finally, the Second Circuit concludes the well-reasoned opinion, and in the present context most importantly . . . with an analysis of factor: "[5] whether the judge has adequately assessed the efficacy of lesser sanctions." I will direct the Court's focus to the specific language "adequately assessed".

In stark contrast, to the record in the petitioner's case where only claims of "consideration" are asserted, there is no material application or form of that consideration. No articulation by the lower courts why lesser sanctions would not work or would not be effective. *Alvarez Id.* The words adequately assessed - is a material process. A consideration in the context of a sanction is not tangible or meaningful if it is not articulated as to why it wouldn't work. Especially, when the result will be the fatality of a . . . person's right to their day in court terminating their case. The court's conclusion and result in *Lesane,* "The balance of the factors that this court has expressly stated must govern Rule 41(b) dismissals clearly indicates that plaintiff's case should not have been dismissed. Accordingly, we VACATE the dismissal and REMAND the case to the district court for further proceedings consistent with this opinion." With regard to factor [5] above, some circuits argue that a framework for progressive discipline is a more fair, reasonable and balanced process, when executing the most severe sanction a court can impose.

Here there was no such "progressive discipline" and, given the absence of a written pretrial order prescribing the method for presentation of exhibits, an extreme sanction of dismissal for disobedience of this phantom order was not merited and denied the petitioner due process. Progressive discipline would have allowed petitioner to be sanctioned to rectify any alleged noncompliance with the ALJ's phantom order. Moreover, a less severe sanction (with the possibility of later progressive discipline for any future noncompliance), would have allowed petitioner's claim to be heard on the merits. For example, the ALJ could have excluded petitioner's exhibits for failure to comply with the phantom order and allowed the case to proceed on testimonial evidence and C-E's exhibits,

even though the court transcript proves they were in the courtroom. The agency's certified record is proof. But most important of all, they are physically in the original record, in the records department where they are now retained. The ALJ's failure to give meaningful consideration to the imposition of lesser sanctions was arbitrary and capricious. The ALJ failed to act on any sanctions. *See* App. 82-90.

H. The Agency's Results by the Administrative Review Board has a Dependence and Holding of the legal framework of the Sixth's Circuit which the circuit court overlooked and misapprehended.

Both the Sixth and the Tenth Circuit Court of Appeals have identified a number of factors to be considered before dismissal of a case is warranted. These factors include: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a for failure to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions were considered. *Conkle,* 352 F.3d at 1337; *Gripe,* 312 F.3d at 1188; *Mulbah,* 261 F.3d at 589; *Knoll,* 176 F.3d at 363; *Ehrehaus,* 964 F.2d at 921.[12] [App. 21] The Sixth Circuit's order . . ."concludes that the issues raised in the petition were 'fully considered' . . ." [App. 2 to 3] But to the contrary, the written order does not articulate

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[12] The Sixth Circuit does not specifically consider the amount of interference with the judicial process among the factors to be considered before dismissal of a case is warranted. See *Mulbah,* 261 F.3d at 589; *Knoll,* 176 F.3d at 363.

any evidence in support of that statement, nor provide any written reasoning or clarity. The fatal act to this case is a vague – open ended warning. This case was terminated on an ambiguous warning. The fatal act is not clear to anyone.

The court may find an abuse of discretion when it is firmly convinced that a mistake has been made. *Adcock-Ladd v. Sec 'y of Treasury, 227* F.3d 343, 349 (6th Cir. 2000). In *Harris v. Callwood,* 844 F.2d 1254, 1256 (6th Cir. 1988), the court held that the dismissal of a complaint represents a harsh sanction to be carefully reviewed on appeal. This case was not carefully reviewed. The Sixth's Circuit's order is inconsistent with their leading case precedents where cases are similarly situated. *See* App. 98.

It is fundamentally unfair to expect that a judicial warning is in general terms as being construed as being broad and not act or issue specific. It would be unreasonable for a warning to be open-ended and not giving a party the reasonable opportunity and timeframe to satisfy the specific warning.

The agency writes regarding Rule 41(b) dismissals;

"The courts further noted that the factors do not create a rigid test but are simply criteria for the court to consider. *Gripe,* 312 F.3d at 1188; *Knoll,* 176 F.3d at 363; *Ehrehaus,* 964 F.2d at 921." (emphasis added) *See* App. 22. Fundamental fairness requires rigidity - applied and tested.

I. The Evidence Supports a Bias Tribunal Theory.

The agency's accumulation of the evidence against Slavin was published on March 31, 2004 before the FD&O in my case was issued on November 30, 2004. (R.123) The well was poised in advance. *In re Slavin*, 2004-MIS-2 and 2004-STA-12 (ALJ - Mar.31, 2004) - ORDER DENYING AUTHORITY TO APPEAR. The agency order concludes *Howick v. Campbell-Ewald 2003-STA-6* "Client's case or

appeal dismissed because of Slavin's actions" at pages 25 to 29. The agency's collective efforts to assemble this record took substantial time and resources. I argue that the depth and the scope of the MIS Order above and the many other opinions issued by the agency regarding Edward A. Slavin, Jr. tainted my case. Again, it is significant to note that one of the first BOPR complaints filed against attorney Slavin was out of the Cincinnati OALJ Office. In addition the following occurred in my case: 1) The ALJ allowed Campbell-Ewald to ignore his first prehearing order and C-E filed no Answers. (R.6; R.9) The ALJ a) failed to issue an order to show cause, and b) failed to preserve my oral default motion. 2) The ALJ failed to act and to resolve constant discovery disputes and to act upon C-E's obstruction tactics as the ALJ has noted. (R.68:TR.pgs.56) 3) The ALJ gave scheduling consideration and priorities to opposing counsel's vacations, over the death of my attorney's father and my health considerations, 4) Admonishing any attorney for his father's death crosses the unacceptable line of judicial behavior.[13] 5) The court transcript provides its own account of the ALJ's unprofessional conduct, tone and demeanor. 6) The ALJ's acceptance the respondent's Motion to Dismiss that broke the agency's own rules but was accepted by ALJ Phalen. 7) The ALJ Ordering ten interviews / depositions and allowing C-E to eat up the clock, refusing to be available on the week-end after being ordered to Detroit by the ALJ and failing to enforce his own orders clearly and without doubt prejudiced me. 8) ALJ Phalen's failure to follow through with a

[13] The agency's ALJ Thomas F. Phalen, Jr. admonishment of the petitioner's attorney after the death of his father was a cruel and mean-spirited act in a judicial setting. *See* App. 79 at 4.

"sanctions" hearing [App. 82 to 90] due to the obstruction and abuses by Campbell-Ewald preventing me from developing and prosecuting an offensive case.

Furthermore, against the notions of fundamental fairness the ALJ admitted he reached a conclusion: "*What I want you to know I do not like this proceeding.*" (R.68:TR.pg.20) In the courtroom on the record, this is relevant evidence a reasonable mind might accept as adequate to support the conclusion the ALJ had formed a prejudged opinion. [*See* App. 97 at 3] The circuit court did not review the trial court's conduct. *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805 (6th Cir. 1999), *Anderson v. Sheppard,* 856 F.2d 741, 746-47 (6th Cir. 1988). The facts and circumstances wholly substantiate my "bias" charge. The obstruction tactics by C-E coupled with ignoring the ALJ's orders must not be overlooked and go without consequence. App. 82-90. *Rice v. City Chicago,* 333 F.3d 780

J. Clarity of the Issues Protect Public Safety And Interest.

The petitioner's revalations of the unlawful conduct in this case protected public safety and public interest. It occured influenced by big advertising dollars and hype. Hearing this case on the merits would yeild benefits to public safety. Additionally, the importance of this whistleblower case and the due process issues will have a significant impact on other agency decisions. To allow this agency case to stand, will errode the integrity of the agency's due process system. The end result will be an open door to dismissing more cases. This case wears away a presumption of fundamental fairness. This case is not just an abuse of discetion, it results in an abuse of trust. The agency's system itself "chills" the acts Congress entrusted them to protect. Finally, should the petitioner prevail here he obtains one result. It is a pure and

simple value. The right to be heard. That's it. This case yeilds no monetary value, but it fights relentlessly for the people's right to be heard and to have . . . their day in court. [14]

CONCLUSION

The petition for writ of certiorari before this Court should be **GRANTED.** While the core holding in *Link* should remain undisturbed, clariflication is needed from this Court so that tribunals may not deny a litigant his day in Court for minor transgressions of oral order. The Court should set forth a framework for trial courts to follow in assessing whether a case should be dismissed under Fed. R. Civ. P. 41. The act of imposing the most severe sanction the judicial system can impose, proving to be fatal to one's right, cannot be comfortably gray. The lines must be black and white. The people can understand the law in these terms. The resolution of these areas of law are of practical importance to a substantial number of people, and would improve overall judical efficiency.

Respectfully submitted,
Mark E. Howick, Petitioner pro se
5628 Lexington Green Place
Dayton, Ohio 45459
Tel. 937-435-4331
Date: Monday, February 12, 2007

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[14] Finally, I chose a course of action to timely file my own BOPR complaint against Mr. Slavin for not returning my files. I proceeded pro se at the Sixth Circuit without full and complete files. In order to protect the integrity of the system, I was compelled to circumvent the damage Mr. Slavin may cause to other clients. *Link* suggests a different remedy. However, I consciously chose to act to protect the other clients and people behind me from the same harm and damage.

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 5, 2006

Mr. Mark E. Howick
5628 Lexington Green Road
Dayton, OH 45459

Re: Mark E. Howick
v. Department of Labor Administrative Review Board
Application No. 06A553

Dear Mr. Howick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on December 5, 2006 extended the time to and including February 12, 2007.

This letter has been sent to those designated on the attached notification list.

Sincerely,
William K. Suter, Clerk
by /s/ Clayton Higgins
Clayton Higgins,
Case Analyst

No. 05-3131

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
SEP 1 5 2006
LEONARD GREEN, Clerk

MARK E. HOWICK,	)	
Petitioner,	)	
v.	)	ORDER
	)	
UNITED STATES DEPARTMENT OF LABOR,	)	
ADMINISTRATIVE REVIEW BOARD,	)	
Respondent,	)	
	)	
CAMPBELL-EWALD COMPANY,	)	
Intervenor.	)	

BEFORE: SUHRHEINRICH, GILMAN, and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully

considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

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* Chief Judge Boggs recused himself from participation in this ruling.

No. 05-3131

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 0 3 2006
LEONARD GREEN, Clerk

MARK E. HOWICK, Petitioner,	)	
v.	)	ON APPEAL FROM
	)	A DECISION FROM
UNITED STATES DEPARTMENT OF LABOR, Administrative Review Board, Respondent,	)	THE DEPARTMENT OF LABOR
CAMPBELL-EWALD COMPANY, Intervenor.	)	

NOT RECOMMENDED
FOR FULL-TEXT PUBLICATION
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ORDER

Before: SUHRHEINRICH, GILMAN, and ROGERS, Circuit Judges.

Mark E. Howick, a pro se Ohio resident, appeals a decision of the Administrative Review Board of the Department of Labor (Board) pursuant to the whistleblower protection provisions of the Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The facts establish that Howick was discharged from his employment with the Campbell Ewald Company on January 13, 2002. Campbell-Ewald was contracted to run the Olympic Torch Relay tour, which traveled across the United States as part of a promotion preceding the 2002 Winter Olympic Games in Salt Lake City, Utah. Campbell-Ewald hired Howick as a truck driver for the tour. Howick's employment was temporary and started on November 12, 2001, and was to end on February 12, 2002.

On January 15, 2002, Howick filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Campbell-Ewald violated the whistleblower provisions of STAA when it fired him. Specifically, Howick alleged that he was fired because he had raised safety hazard issues with Campbell-Ewald management regarding the transportation and use of propane tanks and had complained to Campbell-Ewald management that drivers on the tour were required to drive without rest in excess of the number of hours permitted under Department of Transportation

regulations. After an investigation, OSHA dismissed Howick's complaint as meritless. Howick requested a hearing before an Administrative Law Judge (ALJ).

At a September 9, 2003, hearing, the ALJ dismissed the complaint. On September 18,2003, the ALJ issued a recommended decision and order formalizing the dismissal. (*Howick I*). The ALJ dismissed the complaint pursuant to 29 C.F.R. § I 8.6(d)(2)(v) because Howick had failed to prosecute the case in accordance with the ALJ's pre-hearing orders.

In conjunction with Howick's complaint, Howick's counsel, Edward Slavin, submitted a request for subpoenas and other motions to the ALJ on September 17, 2003. In the submission, Howick indicated that his counsel had visited Chief Administrative Law Judge Daniel J. Roketenetz regarding the original complaint pending before the ALJ and that Judge Roketenetz suggested that Howick file a motion for reconsideration of the dismissal. In light of this submission, Campbell Ewald filed a motion on September 19, 2003, objecting to the ex parte communications. Campbell Ewald requested that a "gag order" be issued during the pendency of the complaint before the ALJ.

Howick responded by filing a complaint with OSHA on September 19, 2003, contending that Campbell-Ewald's motion for a "gag order" constituted an adverse action pursuant to the whistleblower provisions of STAA and the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622. (*Howick II*). On September 24, 2003, Campbell-Ewald withdrew the motion for a "gag order" that was the subject of Howick's second complaint.

After an investigation, OSHA dismissed Howick's second complaint because Campbell Ewald had withdrawn the motion for a "gag order" that was the subject of Howick's second complaint and because an appeal of the denial of Howick's original complaint was pending before the Board. Howick requested a hearing before an ALJ.

In *Howick II,* the ALJ issued a Show Cause Order why the complaint should not be dismissed for failure to state a claim or why a summary decision denying the complaint should not be issued. Howick responded with a Motion to Remand, urging that the case be remanded to OSHA for a proper investigation. Campbell-Ewald responded, urging that the complaint be dismissed.

The ALJ denied the Motion to Remand because Howick did not demonstrate that he had contacted Campbell-Ewald in an effort to resolve the matter in accordance with the ALJ's pre hearing order. The ALJ also based his denial on OSHA's finding that Campbell-Ewald's withdrawal of the motion prevented Howick from establishing a prima facie case. The ALJ dismissed Howick's second complaint because Howick failed to show that he had suffered any adverse employment action as a result of Campbell-Ewald's motion.

The Board consolidated Howick's appeals of the dismissals of his two complaints. In reviewing the record as to *Howick I,* the Board found that the ALJ properly considered the appropriate guidelines and factors in determining whether Howick's original complaint should be dismissed in accordance with Fed. R. Civ. P. 41(b). In its discussion, the Board recognized that dismissal of a complaint for failure to comply with an ALJ's order is a very severe penalty to be assessed in only the most extreme cases.

Given the circumstances, however, the Board concluded that the ALJ had acted within his discretion in dismissing Howick's complaint. Before the Board, Howick argued that the ALJ erred in failing to grant Howick summary judgment on the merits of his STAA complaint and for failing to order default judgment and sanctions against Campbell-Ewald for its own abuse of discovery. The Board noted that, rather than respond to the issue before it--the sanction of dismissal--Howick was attempting to argue the merits of his complaint on appeal. Because Howick's appeal to the Board did not explain his or his counsel's actions before the ALJ, the Board affirmed the dismissal of the complaint.

As to *Howick II*, the Board noted that the ALJ recommended that Howick's complaint be dismissed because Howick had failed to show that he had suffered any adverse employment action from the filing of Campbell-Ewald's motion. On appeal to the Board, Howick argued that Campbell-Ewald's motion for a "gag order," filed after the ALJ had decided *Howick I* would have prevented Howick from engaging in protected activity. Howick asserted that the ALJ showed possible bias in issuing his Show Cause Order and erred in failing to remand the case to OSHA for a proper investigation.

The Board stated that to prevail on a complaint under the TSCA, Howick must establish by a preponderance of the evidence that he engaged in protected activity of which Campbell-Ewald was aware; that he suffered adverse employment action; and that the protected activity was the reason for the adverse action. To be actionable, an employment decision must constitute a tangible employment action. Allegations, bare denials, or speculative theories do not create an issue of material fact that would entitle the non-moving party to an evidentiary hearing. After reviewing the

record and the facts in the light most favorable to Howick, the Board agreed that Howick had failed to demonstrate that the filing of the request for a protective order constituted an adverse employment action. Accordingly, the Board affirmed the ALJ's decision in *Howick II.*

The Board's decision dismissing *Howick I and Howick II* was issued on November 30, 2004. Howick filed a timely petition for review with this court. On appeal, Howick argues that the Board erred in affirming the dismissal of his complaint in *Howick I*; that the Board erred by adopting the ALJ's conclusion that he had failed to prosecute his case; that the Board violated his due process rights and abused its discretion by adopting the ALJ's decision; that the Board's decision was motivated by bias against his attorney; and that he should have been able to amend his complaint to include a claim under the TSCA.

The court must affirm the Board's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2)(A); *see also Reich v. Gen. Motors Corp.,* 89 F.3d 313, 315 (6th Cir. 1996). The court may find an abuse of discretion when it is firmly convinced that a mistake has been made. *Adcock-Ladd v. Sec 'y of Treasury, 227* F.3d 343, 349 (6th Cir. 2000). In *Harris v. Callwood,* 844 F.2d 1254, 1256 (6th Cir. 1988), we held that the dismissal of a complaint represents a harsh sanction to be carefully reviewed on appeal. We noted that a district court could dismiss a case if the derelict party had been given explicit notice that "dismissal is contemplated," or if that party engaged in "bad faith or contumacious conduct." *Id.* The record establishes that Howick and his attorney were given explicit notice that their conduct could result in the dismissal of Howick's complaint. Howick and his attorney

chose to ignore the ALJ's warning. Therefore, the Board's decision affirming the ALJ's decision to dismiss Howick's complaint for failure to prosecute was not an abuse of discretion.

Finally, allowing Howick to amend his complaint to raise a similar whistleblower claim under the TSCA would not have saved Howick's complaint from dismissal. The record establishes that the conduct by Howick and his attorney warranted the dismissal of their action for want of prosecution. Allowing the amendment would have simply resulted in additional prejudice and needless expense to Campbell-Ewald. The argument is without merit.

Accordingly, we affirm the Board's decision.

Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

By /s/ Clerk - Leonard Green
Clerk

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, NW
Washington, DC 20210

In the Matter of:

MARK E. HOWICK,
COMPLAINANT, ARB CASE NO. 03-156
ALJ CASE NO. 03-STA-06

v.

CAMPBELL-EWALD COMPANY,
RESPONDENT,

And

MARK E. HOWICK,
COMPLAINANT, ARB CASE NO. 04-065
ALJ CASE NO. 04-STA-07

v. DATE: November 30, 2004

CAMPBELL-EWALD COMPANY,
FRED W. BATTEN, ESQ., and
CLARK HILL PLC,
RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:
For the Complainant:
Edward A. Slavin, Jr., Esq.,[1] *St. Augustine, Florida*
For the Respondents:
Fred W. Batten, Esq., *Clark Hill PLC, Detroit, Michigan*

ORDER OF CONSOLIDATION
AND FINAL DECISION AND ORDER

This case arose originally from a complaint Mark E. Howick filed alleging that his employer, Campbell-Ewald Company, violated the employee protection or whistleblower provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997), when it terminated his employment. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O.) dismissing the complaint (*Howick I*) pursuant to 29 C.F.R. § 1 8.6(d)(2)(v) (2002) because of Howick's failure to prosecute

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[1] Pursuant to an October 20, 2004 Final Order Suspending Attorney from Practice before the Administrative Review Board, the Board imposed reciprocal discipline on Mr. Slavin based on his August 27, 2004 suspension by the jurisdiction in which he is licensed to practice law, the Supreme Court of Tennessee. The October 20 order suspended Mr. Slavin from practicing before this Board for the same period as specified by the Tennessee court order, which affords Mr. Slavin the opportunity to apply for reinstatement after one year from the date of that order. *In the matter of the qualifications of Edward A. Slavin, Jr.*, ARB No. 04-172, slip op. at I (ARB Oct. 20, 2004). Since Mr. Slavin's filings in these cases pre-date the Board's October 20 suspension order, the Board accepts Mr. Slavin's filings on behalf of the complainant in these cases, Mark E. Howick, as the attorney for Howick and decide the cases on their merits.

the case in compliance with the ALJ's pre-hearing orders.[2] The ALJ's findings are supported by a review of the record and comply with the applicable law. Thus, as we discuss below, the ALJ acted within his discretion in dismissing the complaint.

Howick subsequently filed a complaint alleging that Campbell-Ewald's counsel violated the employee protection or whistleblower provisions of the STAA and the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998), as well as the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2004), when Campbell-Ewald filed a motion for a "gag order" with the ALJ assigned to hear his original complaint, during the pendency of that matter. Another Department of Labor ALJ issued a Recommended Order (R. O.) dismissing this complaint (*Howick II*) pursuant to 29 C.F.R. § 18.40(d) (2004), on the basis that Howick failed to plead or show any element necessary to present a claim under the relevant whistleblower provisions.[3] Because the ALJ's determination is supported by a review of the record and is in accord with the relevant whistleblower provisions, the ALJ properly dismissed Howick's second claim, as we also discuss below.

BACKGROUND

Campbell-Ewald was contracted to run the Olympic Torch Relay promotional tour, which traveled across the United

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[2] The ALJ subsequently issued an order denying Howick's request for reconsideration as untimely and as the ALJ found no reason to grant reconsideration.

[3] The ALJ also later issued an order denying Howick's request for reconsideration of the denial of his second complaint.

States as part of a promotion preceding the 2002 Winter Olympic Games in Salt Lake City, Utah. Campbell-Ewald hired Howick as a truck driver for the tour. Howick's employment was temporary and started on November 12, 2001, and was to end on February 12, 2002. Respondent's Exhibit 6. Campbell Ewald fired Howick, however, on or about January 13, 2002.

On January 15, 2002, Howick filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that Campbell-Ewald violated the employee protection or whistleblower provisions of the STAA when it fired him. Specifically, Howick alleged in his complaint that he was fired because he had raised safety hazard issues with Campbell-Ewald management regarding the transportation and use of propane tanks on the tour and had complained to Campbell-Ewald management that drivers on the tour were required to drive without rest in excess of the number of hours permitted under the Department of Transportation hours of service regulations. After an investigation, OSHA dismissed Howick's complaint as non meritorious and Howick requested a hearing before the Office of Administrative Judges.

At a hearing on September 9, 2003, the ALJ dismissed the complaint. Hearing Transcript at 55. Subsequently the ALJ issued a R. D. & O. on September 18, 2003, formalizing his dismissal of the complaint (*Howick I*). The ALJ dismissed the complaint pursuant to 29 C.F.R. § 18.6(d)(2)(v) because of Howick's failure to prosecute the case in accordance with the ALJ's pre-hearing orders.

In conjunction with the litigation of Howick's original complaint, Howick's counsel, Mr. Slavin, had submitted a request for subpoenas and other motions to the ALJ on September 17, 2003. In this September 17 submission, Howick indicated that his counsel had visited Chief Administrative Law Judge Daniel J. Roketenetz regarding his original complaint pending before the ALJ and that Judge Roketenetz suggested that Howick file a motion for reconsideration of the dismissal of his original complaint.[4] In light of this, Campbell-Ewald filed a motion on September 19, 2003, objecting to Howick and his counsel's ex parte communications and requesting a "gag order" during the pendency of his original complaint before the ALJ.

Howick responded by filing a complaint with OSHA on September 19, 2003, (*Howick II*), contending that Campbell-Ewald's motion for a "gag order" constituted an adverse action pursuant to, and per se violation of, the whistleblower provisions under the STAA and TSCA. On September 24, 2003, Campbell-Ewald withdrew the motion for a "gag order" that was the subject of Howick's second complaint.

After an investigation, OSHA dismissed Howick's second complaint because Campbell-Ewald had withdrawn the motion for a "gag order" that was the subject of Howick's second complaint and because an appeal of the denial of Howick's original complaint was pending before the Board. Howick requested a hearing before the Office of Administrative Judges on his second complaint.

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[4] Howick did ultimately file a motion for reconsideration of the dismissal of his original complaint on October 16, 2003, which the ALJ denied in an order issued on October 21, 2003.

In *Howick II,* the ALJ issued an Order to Show Cause why the complaint should not be dismissed for failure to state a claim upon which relief can be granted or why a summary decision denying the complaint should not be issued. Howick responded with a Motion to Remand, urging that the case be remanded to OSHA for a proper investigation of his complaint. Campbell-Ewald responded, urging that the complaint be dismissed.

The ALJ denied Howick's Motion to Remand, on the basis that he did not demonstrate that he had contacted Campbell-Ewald in an effort to resolve the matter, in accordance with the ALJ's instructions in his pre-hearing order. The ALJ also denied the motion since OSHA had denied the complaint because Howick could not develop a prima facie case in light of the fact that Campbell-Ewald withdrew the motion that was the subject of Howick's complaint. R. O. at 2-3. Ultimately the ALJ dismissed Howick's second complaint pursuant to 20 C.F.R. § 18.40(d) as Howick failed to show that he had suffered any adverse employment action under the STAA from the filing of Campbell Ewald's motion. R. O. at 3.

ISSUES

1. Whether the ALJ abused his discretion in dismissing Howick's original complaint.
2. Whether Campbell-Ewald was entitled to summary decision on Howick's second complaint.

CONSOLIDATION OF ARB CASE Nos. 03-156 AND 04-065

In view of the substantial identity of the legal issues and the commonality of much of the evidence, and in the interest of judicial and administrative economy, Howick's appeals of the dismissals of his two complaints (*Howick I & II*) are

hereby consolidated for the purpose of review and decision. *See Agosto v. Consolidated Edison Co. of New York, Inc.*, ARB Nos. 98-007, 152, ALJ Nos. 96-ERA-2, 97-ERA-54 (ARB July 27, 1999); *Bonanno v. Stone & Webster Eng 'g*, ARB Nos. 96-110, 165, ALJ Nos. 95-ERA-54, 96-ERA-7 (ARB Dec. 12, 1996).

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board the authority to issue final agency decisions under, inter alia, the STAA and the implementing regulations at 29 C.F.R. Part § 1978 (2004). Secretary's Order 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002). These complaints are before the Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a).[5] Pursuant to 29 C.F.R. § 1978.109(c)(l), the Board is required to issue "a final decision and order based on the record and the decision and order of the administrative law judge."

When reviewing STAA cases, the Administrative Review Board is bound by the ALJ's factual findings if they are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); BSP Trans, Inc. v. United States Dep't of Labor, 160 F.3d 38, 46 (1st Cir. 1998); Castle Coal & Oil Co., Inc. v. Reich, 55 F.3d 41, 44 (2d Cir. 1995); Lyninger v. Casazza Trucking Co., ARB No. 02-1 13, ALJ No. 01-STA-38, slip op. at 2 (ARB Feb. 19, 2004). Substantial evidence is that which is "more than a mere scintilla. It means such relevant evidence as a

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[5] This regulation provides, "The [ALJ's] decision shall be forwarded immediately, together with the record, to the Secretary for review by the Secretary or his or her designee."

reasonable mind might accept as adequate to support a conclusion." Clean Harbors Envtl. Services, Inc. v. Herman, 146 F.3d 12, 21(1st Cir. 1998) (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)); McDede v. Old Dominion Freight Line, Inc., ARB No. 03-107, ALJ No. 03-STA-12, slip op. at 3 (ARB Feb. 27, 2004).

In reviewing the ALJ's conclusions of law, the Board, as the Secretary's designee, acts with "all the powers [Secretary] would have in making the initial decision ..." 5 U.S.C.A. § 557(b) (West 1996). Therefore, the Board reviews the ALJ's conclusions of law de novo. See Yellow Freight Sys., Inc. v. Reich, 8 F.3d 980, 986 (4th Cir. 1993); Roadway Express, Inc. v. Dole, 929 F.2d 1060, 1066 (5th Cir. 1991); Monde v. Roadway Express, Inc., ARB No. 02-071, ALJ Nos. 01-STA-22, 01-STA-29, slip op. at 2 (ARB Oct. 31, 2003).

On reviewing a dismissal made in accordance with Rule 41(b) of the Federal Rules of Civil Procedure (giving courts the authority to dismiss a case for "failure of the plaintiff to prosecute or to comply with these rules or any order of [the] court"), we determine whether the ALJ abused his discretion in dismissing the case. Fed. R. Civ. P. 41(b); see Dickson v. Butler Motor Transit/Coach USA, ARB No. 02-098, ALJ No. 01 - STA-039, slip op. at 4 (ARB July 25, 2003)("ALJ acted well within his discretion in determining that dismissal was the appropriate sanction for failure to comply with the ALJ's orders"); Dickson v. Lakefront Lines, Inc., ARB No. 02-029, ALJ No. 01-STA-62, slip op. at 4 (July 24, 2003)(ALJ "was acting within his discretion to recommend dismissal"). See also *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962); *Conkle v. Potter*, 352 F.3d 1333, 1337 (10th Cir. 2003); *Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002); *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586, 589 (6th Cir. 2001); *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999); *Ehrehaus v. Reynolds*, 964 F.2d 916,

920 (10th Cir. 1992); *Carter v. City of Memphis*, 636 F.2d 159, 161 (6th Cir. 1980).[6]

Finally, in regard to Howick's complaint under the TSCA *(Howick II)*, the environmental whistleblower statutes authorize the Secretary of Labor to hear complaints of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003). The Secretary has delegated authority for review of an ALJ's initial decisions to the ARB. 29 C.F.R. § 24.8 (2004). See Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's recommended decision. See 5 U.S.C.A. § 557(b) (West 2002); 29 C.F.R. § 24.8; Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); Berkman v. United States Coast Guard Acad., ARB No. 98-056, ALJ No. 97-CAA-2, 97-CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

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[6] As the ALJ in *Howick I* observed, Howick resides in Ohio and Campbell-Ewald is located in Michigan, both of which fall within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, while Howick's termination from his employment with Campbell-Ewald occurred in Kansas, which is located within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. R. D. & O. at 23.

DISCUSSION

Howick I

The ALJ's attempts in *Howick I* to obtain Howick's compliance with the ALJ's orders and Campbell-Ewald's discovery requests prior to and during the hearing are detailed at great length at pages 1-21 of the ALJ's R. D. & O. We adopt those findings of fact as supported by substantial evidence on the record considered as a whole. A review of the ALJ's R. D. & O. indicates that the ALJ properly considered the appropriate guidelines and factors in determining whether Howick's original complaint should be dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure. R. D. & O. at 23.

Rule 41(b) authorizes the courts to dismiss a case for "failure of the plaintiff to prosecute or to comply with these rules or any order of [court." Fed. R. Civ. P. 41(b); *Link,* 370 U.S. at 629 n.3. Like the courts, Department of Labor Administrative Law Judges must necessarily manage their dockets in an effort to "achieve the orderly and expeditious disposition of cases." *Puckett v. Tennessee Valley Auth.,* ARB No. 03- 024, ALJ No. 02-ERA-15, slip op. at 3 (ARB June 25, 2004); *Curley v. Grand Rapids Iron & Metal Co.,* ARB No.00-013, ALJ No. 99-STA-39, slip op. at 2 (ARB Feb. 9, 2000). Thus, an ALJ may recommend dismissal of a complaint based upon a party's failure to comply with his order. 29 C.F.R. § 18.6(d)(2)(v); see also 29 C.F.R. § 1978.106(a) (providing for application of the procedural rules at 29 C.F.R. Part 18 in STAA hearings unless otherwise

provided by the Part 1978 STAA regulations).[7] Nevertheless, dismissal of a complaint for failure to comply with the ALJ's orders is a very severe penalty to be assessed in only the most extreme cases. *Accord* Fed. R. Civ. P. 37(b)(2)(C); *Conkle,* 352 F.3d at 1337; *Ehrehaus,* 964 F.2d at 920; *Carter,* 636 F.2d at 161.

Both the Sixth and the Tenth Circuit Court of Appeals have identified a number of factors to be considered before dismissal of a case is warranted. These factors include: (1) prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action could be a for failure to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions were considered. *Conkle,* 352 F.3d at 1337; *Gripe,* 312 F.3d at 1188; *Mulbah,* 261 F.3d at 589; *Knoll,* 176 F.3d at 363; *Ehrehaus,* 964 F.2d at 921.[8]

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[7] 29 C.F.R. § 18.6(d)(2) provides:

If a party or an officer or agent of a party fails to comply with .. an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(v) Rule that . . . a decision of the proceeding be rendered against the non-complying party....

29 C.F.R. § 18.6(d)(2).

[8] The Sixth Circuit does not specifically consider the amount of interference with the judicial process among the factors to be considered before dismissal of a case is warranted. *See Mulbah,* 261 F.3d at 589; *Knoll,* 176 F.3d at 363.

The courts further noted that the factors do not create a rigid test but are simply criteria for the court to consider. *Gripe,* 312 F.3d at 1188; *Knoll,* 176 F.3d at 363; *Ehrehaus,* 964 F.2d at 921.

In *Howick I,* the ALJ specifically found a record of "delay and malfeasance" by Howick and his counsel, Mr. Slavin, noting:

> their causing delays of over eight months in scheduling Howick's deposition, until four days before the hearing; causing delays of over four months in scheduling the hearing; causing delays of over six months in answering Campbell-Ewald's discovery requests; Howick's and his counsel's failure to communicate with Campbell-Ewald that Howick could not appear for a scheduled deposition; Howick's delay in completing his deposition; their violating of the ALJ's orders, including the ALJ's order to have trial exhibits marked, indexed and timely exchanged; their filing of frivolous motions; their requesting subpoenas after 4:00 pm on Friday September 4, 2003, before the September 9, 2003 hearing; and ultimately their failure to be prepared at the hearing with trial exhibits marked, indexed and exchanged.

R. D. & O. at 25-28. Thus, the ALJ found a record of interference with the judicial process due to the culpability or fault of Howick and his counsel, Mr. Slavin.

The ALJ further found that Howick's and Slavin's conduct prejudiced Campbell Ewald, preventing Campbell-Ewald from developing evidence and mounting a meaningful defense. R. D. & O. at 26. Furthermore, the ALJ properly warned Howick and Slavin at the pre-hearing conference, in

a pre-hearing order and, ultimately, at the hearing that Howick was risking sanctions, up to and including dismissal. See R. D. & O. at 26-27. Howick's counsel is well aware of the consequences of risking sanctions, up to and including dismissal, for failing to comply with an ALJ's orders and a respondent's discovery requests. See *Puckett,* slip op. at 3; *Dickson,* ARB No. 02-098, slip op. at 4; *Dickson,* ARB No. 02-029, slip op. at 4.

Although the Sixth Circuit, for one, has expressed reluctance to uphold the sanction of dismissal where fault lies solely with the client's attorney, and not the client himself, *Mulbah,* 261 F.3d at 590; *Knoll,* 176 F.3d at 363; *Carter,* 636 F.2d at 161, the ALJ found this case distinguishable. The ALJ found a record of delay not only by Howick's counsel, Mr. Slavin, but an active role by Howick himself in preventing Campbell-Ewald from mounting a meaningful defense due to his reckless disregard for the effect of his own conduct. R. D. & O. at 27.

Finally, the ALJ also considered the efficacy of lesser sanctions. After considering the totality of the circumstances and the overall course of dilatory and contemptuous behavior of both Howick and his counsel in wasting the ALJ' s time and resources, the ALJ did not believe that any alternative sanction other than dismissal was warranted in this case. R. D. & O. at 28-29.

After reviewing the R. D. & O., the case record and the parties' briefs, we conclude that the record supports the ALJ's findings and the ALJ's recommendation to dismiss Howick's original complaint is based on the appropriate consideration and factors in compliance with the relevant, applicable law. Consequently, we conclude that, in these circumstances, the ALJ acted within his discretion in dismissing Howick's original complaint.

On appeal, Howick contends that the ALJ erred in failing to grant Howick summary judgment on the merits of his STAA complaint, failing to order default judgment and sanctions against the respondent for its own abuse of discovery, and asks the Board to reverse the ALJ's orders, except his pre-hearing order, and his R. D. & O. and remand the case to a new ALJ or to OSHA for a proper investigation of his complaint. Howick is attempting to reach the merits of his complaint on appeal, but has not responded to the issue before the Board, which is the sanction of dismissal. Because Howick's appeal to this Board does not explain his or his counsel's actions before the ALJ, however, we affirm the ALJ's R. D. & O. and dismiss the complaint.[9]

Howick II

The ALJ recommended that Howick's complaint be dismissed pursuant to 20 C.F.R. § 18.40(d), because the ALJ concluded that Howick failed to show that he had suffered any adverse employment action under the STAA from the filing of Campbell Ewald's motion. R. & O. at 3. In other words, the ALJ found that Howick failed to allege the essential elements of a violation of the STAA's whistleblower protection provisions.

On appeal, Howick requests oral argument and summary reversal of the ALJ's order. Specifically, Howick contends that the ALJ had jurisdiction to consider the complaint, as

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[9] Because we adopt the ALJ's R. D. & O. and dismiss the complaint, we need not address Campbell-Ewald's motion for the Board to strike copies filed with the Board of evidence and motions that Howick filed with the ALJ after the issuance of his original R. D. & O. (including Howick's motion for reconsideration) or address Howick's response, that the ALJ erred in failing to grant his motion for reconsideration.

Campbell-Ewald's motion for a "gag order" to the ALJ in *Howick I*, filed after the ALJ had decided that case, would have prevented Howick from engaging in protected activity if it were granted. Finally, Howick asserts that the ALJ showed possible bias in issuing his Order to Show Cause and erred in failing to remand the case to OSHA for a proper investigation of his complaint.[10]

To prevail on a complaint under the environmental whistleblower protection provisions, such as the TSCA, Howick must establish by a preponderance of the evidence that he engaged in protected activity of which Campbell-Ewald was aware, that he suffered adverse employment action, and that the protected activity was the reason for the adverse action. Seetharaman v. General Elec. Co., ARB No. 03-029, ALJ No. 2002- CAA-21, -CAA-21, slip op. at 5 (ARB May 28, 2004); Jenkins v. United States Envtl. Prot. Agency, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 9 (ARB Feb. 28, 2003) (emphasis added). See also Schlagel v. Dow Corning Corp., ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 5 (ARB Apr. 30, 2004). Similarly, to prevail on a claim under the STAA, Howick must prove by a preponderance of the evidence that he engaged in protected

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[10] On appeal, Howick also reiterates the contention that he made in a motion for reconsideration before the ALJ, that Campbell-Ewald's request that the case be dismissed in response to the ALJ's Order to Show Cause constituted a "motion" and, therefore, Campbell-Ewald also had failed to demonstrate that it had contacted Howick in an effort to resolve the matter in accordance with the ALJ's instructions in his pre-hearing order. The ALJ properly denied Howick's motion for reconsideration, however, because Campbell-Ewald's request that the complaint be dismissed was made in response to the ALJ's Order to Show Cause and was not an unexpected motion seeking or requesting anything in addition to answering the question raised by the ALJ in his order.

activity, Campbell-Ewald was aware of the protected activity, Campbell Ewald discharged him, or disciplined or discriminated against him with respect to pay, terms, or privileges of employment, and there is a causal connection between the protected activity and the adverse action. 49 U.S.C.A. § 31105(a) (West 1997) (emphasis added); BSP Trans., Inc. v. United States Dep't of Labor, 160 F.3d 38, 45 (1st Cir. 1998); Clean Harbors Envt'l Sen's., Inc. v. Herman, 146 F.3d 12, 21(1st Cir. 1998); Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994); Moon v. Transp. Drivers, Inc., 836 F.2d 226, 228 (6th Cir. 1987).

The ALJ's' summary judgment regulations provide in pertinent part:

> The administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.

20 C.F.R. § 18.40(d).

As indicated above, to prevail in this matter Howick would have to prove by a preponderance of the evidence that Campbell-Ewald's motion for a "gag order" constituted an adverse employment action or discipline or discrimination against him with respect to the pay, terms, or privileges of his employment. An adverse employment action does not encompass every decision that an employer makes that renders an employee unhappy. To be actionable, a decision must constitute a tangible employment action, for example a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Marshall v. Lockheed Martin Energy

Sys., Inc., ARB No. 03-026, ALJ No. 96-CAA-8, slip op. at (ARB Sep. 29, 2004); Jenkins, slip op. at 19. Allegations, bare denials, or speculative theories do not create an issue of material fact that would entitle the non-moving party to an evidentiary hearing. Seetharaman, slip op. at 6.

After reviewing the record and the facts in the light most favorable to Howick, we agree with the ALJ that Howick has failed to demonstrate a dispute in material fact and that he has failed to allege and to adduce evidence in support of an essential element of his complaint, which is that the filing of the request for a protective order constituted an adverse employment action or discipline or discrimination against him with respect to the pay, terms, or privileges of his employment. Somerson v. Mail Contractors of America, ARB No. 03-042, ALJ No. 03-STA-1 I, slip op. at 7 (ARB Oct. 14, 2003). Neither Howick's complaint or response to the ALJ's Order to Show Cause, nor his briefs to us on appeal, contending that Campbell-Ewald's motion for a "gag order" violated the whistleblower provisions under the STAA and TSCA, satisfy his burden on summary decision under 20 C.F.R. § 18.40(d) to show that he suffered any adverse "employment" action under those statutes from the filing of Campbell-Ewald's motion. At summary decision, Howick must produce affidavits or other admissible evidence that he suffered "employment" discrimination because of his safety complaints. Having failed to do so, Campbell-Ewald is entitled, as the ALJ found, to summary decision.[11]

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[11] Because neither Howick's complaint nor his briefs on appeal satisfy his burden to show that he suffered any adverse "employment" action under either the STAA or the TSCA, any error by the ALJ in not addressing Howick's second complaint under the TSCA was harmless. Moreover, as Campbell-Ewald is, therefore, entitled to summary decision, Howick's request for oral argument is denied.

CONCLUSION

The record supports the ALJ's recommendation in *Howick I* to dismiss Howick's original complaint. Howick's appeal to this Board does not explain his or his counsel's actions before the ALJ and the ALJ acted within his discretion in dismissing Howick's original complaint, based on the appropriate consideration and factors in compliance with the relevant, applicable law. We therefore **AFFIRM** the ALJ's R. D. & O. in *Howick I* and **DISMISS** Howick's original complaint.

In *Howick II,* because Howick has not shown that he suffered any adverse employment action under the TSCA or STAA from the filing of Campbell-Ewald's motion for a "gag order," Campbell-Ewald is entitled to summary decision as a matter of law. Therefore, we **DISMISS** Howick's complaint in *Howick II.*

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

UNITED STATES DEPARTMENT OF LABOR
Offices of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

Issue Date: 18 September 2003

Case No. 2003-STAA-00006

MARK E. HOWICK,
Complainant,
v.
CAMPBELL-EWALD COMPANY,
Respondent.

RECOMMENDED DECISION AND ORDER - DISMISSAL OF COMPLAINT

This matter arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. This matter is before me on Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor Occupational Safety and Health Administration ("OSHA") after investigation of the complaint. 49 U.S.C. § 31105(b)(2)(A), 29 C.F.R. § 1978.105.

Findings of Fact and Conclusions of Law

Mark Howick ("Complainant") was discharged from his employment with Campbell-Ewald ("Respondent") on or about January 13, 2002. Complainant filed a verbal complaint of discrimination in violation of the STAA with OSHA on or about January 15, 2002. On September 27, 2002, OSHA recommended that Complainant's complaint be dismissed as non meritorious. Complainant filed a "notice of objections to the findings & request for hearing" on October 30, 2002. The undersigned issued a pre-hearing order on November 18, 2002. Following a telephone conference on December 23, 2002, an order and memorandum of telephone conference was issued setting the deadlines for completion of discovery matters and scheduling the hearing for April 29 through May 2, 2003 in Dayton, Ohio. Through a proper notice of deposition, Respondent scheduled the deposition of Complainant for January 29, 2003 in Dayton, Ohio. The parties filed a joint request for the appointment of a settlement judge. Chief Administrative Law Judge John Vittone appointed Administrative Law Judge Daniel J. Roketenetz as the settlement judge on January 17, 2003. Following a conference call on January 24, 2003, an order was issued granting an extension of discovery deadlines and re-scheduling the hearing for June 10 through June 13, 2003. Additionally, the parties agreed that Complainant would answer Employer's interrogatories and requests for production of documents by February 24, 2003. Complainant and Respondent also agreed to reschedule the deposition of Complainant, which had been scheduled for January 29, 2003 in Dayton, Ohio, to March 1, 2003 in Dayton, Ohio.

Edward Slavin, Esq. entered a notice of appearance on behalf of Complainant on January 29, 2003. Additionally, Complainant served his first request for admissions and

requested that the settlement judge conference call, which had been scheduled for January 31, 2003, be rescheduled. On February 10, 2003, Complainant faxed a letter to the undersigned entitled "MR. HOWICK'S MOTION FOR A PROTECTIVE ORDER FOR SIMULTANEOUS EXCHANGE OF DISCOVERY RESPONSES." In the letter, counsel for Complainant stated that Complainant had to take three weeks off of work due to his father's hospitalization. Noting that Complainant's responses to Respondent's discovery requests were due on February 24, 2003, Complainant proposed that a simultaneous exchange of discovery responses be set for February 28, 2003 in order to protect Complainant from annoyance, embarrassment, oppression, or undue burden or expense and as a reasonable accommodation of the Howick family pursuant to the Americans with Disabilities Act and *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Sep. 27, 1996). Respondent filed an objection to Complainant's motion for a protective order on February 14, 2003, noting that Complainant had already had his deposition rescheduled from January 29, 2003 to March 1, 2003 and that he had been granted an extension to complete discovery responses from January 24, 2003 to February 24, 2003. On February 14, 2003, the undersigned found no basis to issue a protective order, construed Complainant's motion for a protective order as a motion for extension of time to file answers to interrogatories only, and granted Complainant an extension to complete Respondent's interrogatories and request for production of documents until February 26, 2003 due to an illness in Complainant's family. Employer was directed to respond to Complainant's interrogatories and request for production of documents by February 28, 2003. In this order, the undersigned repeated his prehearing conference admonition to the parties that they contact each other

regarding requests for extensions and similar procedural matters before filing a motion with the undersigned.

On February 14, 2003, Respondent served an amended notice of deposition on Complainant, scheduling Complainant's deposition for March 1, 2003. That same day, Complainant faxed and mailed a letter to the undersigned entitled as "Mr. Howick's: 1. Motion to Correct the Record; 2. Motion for Default Judgment 3. Motion to Quash Notice of Deposition for March 1, 2003 and Reschedule Depositions on March 8, 2003." Complainant's motion to correct the record centered on counsel for Complainant's assertion that he had never been told by counsel for Respondent that counsel for Respondent would be out of the country. Complainant's motion to quash the notice of deposition was founded on Complainant's assertion that the parties had agreed upon March 6, 7, or 8, 2003 as the dates for Complainant's deposition, not March 1, 2003. Complainant, based on his assertion that Respondent failed to timely answer the undersigned's prehearing order, moved for default judgment, adverse inferences and preclusions orders. In response, the undersigned issued an amended order and order on February 21, 2003. The amended order vacated the undersigned's order dated February 14, 2003, and denied Complainant's three requests. The undersigned denied Complainant's two letter requests because they did not conform with the procedural regulations governing the filing of motions under 29 C.F.R. Part 18. Counsel for both parties were instructed to file individual motions accompanied by distinct memoranda in support of those motions. Furthermore, the parties were apprized "that official and personal considerations such as the initial appearance of counsel, family illnesses and planned vacations or trips will be considered, . . . , as long as such considerations are not abused." The parties were admonished to resolve the

outstanding discovery issues between them, including due dates for complete answers to interrogatories and the dates of depositions. On February 25, 2003, settlement proceedings were extended for sixty days. However, Administrative Law Judge Roketenetz issued an order on February 28, 2003 terminating settlement proceedings.

On April 14, 2003, Complainant requested an extension of the trial date and all deadlines in this action due to "family health and financial hardships relating to his having to go back to work today after having taken approximately three months off to assist his ailing aged parents." Complainant asserted that Respondent agreed to the extension, provided that Complaint provided Respondent with a copy of Complainant's OSHA complaint and other OSHA documents. Counsel for Complainant stated that, when Complainant was not working or caring for his parents, he would work on his responses to Respondent's discovery requests. The undersigned issued a second amended scheduling order granting a ninety-day extension of all deadlines. August 1, 2003 was established as the discovery cutoff date, with motions and replies to motions due by August 15, 2002 and August 22, 2002 respectively. The hearing was re-scheduled for September 9 through September 13, 2003 in Dayton, Ohio.

On July 9, 2003, Complainant filed a motion to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Another telephone conference was held between the parties on July 25, 2003. As a result of the telephone conference, a third amended scheduling order was issued. The discovery cutoff date was extended to August 8, 2003, with exceptions allowed for scheduled depositions and requests for individual interviews commencing on August

19, 2003. Additionally, the July 25, 2003 order granted Complainant's request to conduct individual interviews of non-management employees of Respondent, provided that Complainant provide counsel for Respondent with a list of the individuals to be interviewed by August 11, 2003. Respondent was granted an extension of time to file a response to Complainant's motion to amend the complaint to join Jack Maxwell as an individual respondent and to add the Toxic Substances Control Act as an additional statutory basis for relief. Complainant submitted a document entitled "Complainant's Motions *In Limine* 1-10" on July 28, 2003. Respondent submitted a response to Complainant's motion to amend complaint on July 31, 2003. The undersigned issued an order denying Complainant's motion to amend his complaint on August 7, 2003, finding that resolution on the merits will not be facilitated by adding Jack Maxwell as an individual respondent and because of the prejudice that Jack Maxwell would suffer from being added at such a late point in the matter, and additionally finding that Complainant's motion to add the TSCA was untimely and that Complainant provided no circumstances to justify the application of the doctrine of equitable tolling. Also on August 7, 2003, Respondent submitted a brief in opposition to Complainant's motion *in limine*.

Counsel for Complainant left a voice-mail message for the undersigned's attorney-advisor, Craig Hoffman, on August 11, 2003, wherein he stated the following:

> Hi, this is Ed Slavin, (904) 471-7023. I am calling to advise the Court that my father has died and I have to go back to New Jersey for the funeral. I am the only son, the only child, and my mom is in her mid-eighties. We are going to file a motion for partial summary judgment before I leave for New Jersey. We will mail that to the judge, unless you . . . *continued*

want it faxed. Mr. Howick will send the exhibits from Dayton direct by mail with a separate notice of filing. We are going to ask for some relief due to my father's death on the deadline for filing any discovery motions. I don't know if we need to. They are evasive, but they don't have any facts either, so we don't need necessarily to file any discovery motions but just to preserve the option. And we are going to want to reschedule the depositions. I will get a letter out of here in a little while, maybe this afternoon. I am working on the obituary right now. Anyway, I just wanted to keep you posted and if Judge Phalen would want the motion for summary judgment faxed so that you can start researching on it, I will be happy to do so, it is going to be a 25-pager, I think. Also, I can email it, if you like and send it in WordPerfect or whatever format. Anyway, thank you now, (904) 471-7023.

On August 12, 2003, Complainant filed a motion for "partial summary judgment on the issues of res judicata and collateral estoppel on the lack of 'just cause' for the firing and the lack of any 'insubordination,' as found by the State of Ohio, and on liability for firing and blacklisting, subject matter jurisdiction, timeliness, temporal nexus, employer-employee, notice and knowledge of protected activity, and creation of a hostile working environment." Counsel for Complainant also requested leave to file further exhibits due to the need to review Respondent's discovery responses and due to the death of counsel's father. The additional exhibits in support of Complainant's motion for partial summary judgment were not received until August 22, 2003. Additionally, upon leave to make further filings, Complainant requested that the undersigned vacate the August 7, 2003 decision and order "on Mr. Maxwell and TSCA." Attached to Complainant's motion for partial summary judgment were motions from Complainant for a

protective order regarding his personal and financial information, as well as a motion to alter deadlines for discovery and discovery motions due to the death of counsel's father. The undersigned issued a notice of hearing on August 13, 2003, declaring that a formal hearing was scheduled for September 9 through September 13, 2003 in Dayton, Ohio.

My attorney-advisor, received a telephone call from counsel for Respondent on August 18, 2003. Respondent's counsel asked him if he was aware of whether or not Complainant was going to attend his deposition scheduled for August 19, 2003. Respondent's counsel informed him that he could not reach counsel for Complainant by telephone, and he stated that he could not contact Complainant since Complainant was represented by counsel. My attorney-advisor telephoned counsel for Complainant, but could not leave a message because his answering machine did not have any remaining memory to store a message. He then left a message on the answering machine of Complainant's home telephone, and sent an email to Complainant asking the Complainant to inform the court of whether or not he would appear for his deposition scheduled on August 19, 2003. Complainant replied to the email at 11:47 pm on August 18, 2003. Instead of providing an answer to the question of whether or not he would appear for his scheduled deposition, Complainant discussed his efforts and attempts to send documents to the court in support of his motion for partial summary judgment.

On August 20, 2003, the undersigned issued an order denying Complainant's motion *in limine*, and cautioned Complainant against filing frivolous pleadings, motions, or other papers for an improper purpose or without evidentiary support for factual contentions. Counsel for Complainant left

a voicemail message for my attorney-advisor on August 21, 2003. When he returned counsel's phone call, counsel for Complainant informed my attorney-advisor about renumbering Complainant's exhibits in support of his motion for partial summary judgment. Counsel for Complainant also advised my attorney-advisor that the he intended to reschedule the depositions sooner rather than later, but indicated that Complainant had recently been diagnosed with hypertension. Counsel for Complainant stated that, if Complainant was unable to travel, then he was going to request that the depositions be conducted in Dayton, Ohio.

The undersigned received exhibits from Complainant in support of his motion for partial summary judgment on August 22, 2003, and again on August 23, 2003. Also on August 22, 2003, Respondent filed a brief in opposition to the motions filed by Complainant on August 12, 2003. Respondent filed a motion to dismiss on August 27, 2003 together with a brief in support of motion to dismiss and a supporting affidavit from counsel for Respondent. Respondent set forth the course that discovery has taken in this matter, concluding with Respondent's claim that he was unsure that Complainant notified him that he would not attend his deposition on August 19, 2003, which was the third time that Complainant's deposition had been scheduled. Respondent then stated that Complainant would not re-schedule the deposition, unless it was a deposition conducted over the telephone. Furthermore, Respondent alleged that it has been prejudiced by presently having been unable to depose Complainant with the hearing scheduled to begin on September 9, 2003. In requesting that the undersigned dismiss Complaint's claim, Respondent recognized that dismissal is a harsh sanction, but argued that it was needed to penalize Complainant for his conduct and to deter others from engaging in similar conduct. Complainant filed a

response to Respondent's response to Complainant's motion for partial summary judgment on August 25, 2003, and a response on August 28, 2003 to Respondent's motion to dismiss. Complainant stated that he would appear, along with his counsel, "in Michigan next week for depositions of Mr. Howick and other witnesses." He again relied upon personal reasons to justify his unavailability.

The undersigned conducted a conference call with the parties on August 28, 2003, wherein the undersigned advised the parties of his rulings on all motions presently pending. During the conference call, Complainant represented that he will make himself available in Michigan on September 3, 2003. Additionally, he stated his intent to conduct individual interviews with non-management level employees of Respondent. Respondent objected to Complainant conducting informal interviews because the time period for conducting discovery had passed and because Respondent believed that the list of Respondent's employees who were designated[1] to be informally interviewed by Complainant included almost every non-management employee of Respondent. Over Respondent's objection, the undersigned permitted Complainant to conduct no more than the combined sum of ten informal interviews and depositions. Counsel for Respondent agreed to schedule the deposition of Complainant on September 3, 2003, provided that the deposition was conducted in the offices of counsel for Respondent in Detroit, Michigan. Counsel for Complainant vehemently objected to the offices of counsel for Respondent as the situs for the deposition of Complainant.[2] The undersigned, over Complainant's objection, ruled that the offices of counsel for Respondent in Detroit, Michigan would be the situs for the deposition of Complainant on September 3, 2003.

The undersigned then addressed Respondent's motion to dismiss. Since the motion to dismiss was predicated on the three separate failures of Complainant to attend his scheduled deposition, and in light of Complainant's representations that he would appear in Detroit, Michigan on September 3, 2003 for his deposition, a ruling on Respondent's motion to dismiss was reserved. A final decision on Respondent's motion to dismiss was to be provided at the outset of the hearing, in part based on whether or not Complainant attended his deposition as scheduled. The parties were informed that their prehearing statements were due by September 2, 2003. Counsel for Complainant requested permission to incorporate Complainant's motion for partial summary judgment into the prehearing statement, which was denied by the undersigned. The undersigned informed the parties that the prehearing statement was not to be an argumentative document. Rather, the parties were instructed their prehearing statements should include short, plain statements of the issues, a list of witnesses, and a list of exhibits.

The undersigned issued an order on August 29, 2003, which set forth the rulings communicated to the parties during the August 28, 2003 conference call. The order consisted of the following: order denying Complainant's motion for partial summary judgment; order denying Complainant's motion for leave to file further exhibits/argument; order denying Complainant's motion to vacate the order dated August 7, 2003; order denying Complainant's motion to alter deadlines; order reserving judgment on Complainant's motion for a protective order; order reserving ruling on Respondent's motion to dismiss; pre-trial order; and a fourth amended scheduling order. Complainant's motion for partial summary judgment was denied under 29 C.F.R. § 18.40(d) since Complainant denied

Respondent access to information by means of discovery. Allowing Complainant to prevail on a motion for partial summary judgment when he obstructed Respondent's ability to mount a meaningful defense to the motion would violate Respondent's right to procedural due process. Moreover, the undersigned found that the record was replete with genuine issues of material fact. The undersigned reserved ruling on Respondent's motion to dismiss. The undersigned noted that he was considering alternative sanctions to dismissal of his claim as authorized by 29 C.F.R. § 18.6(d), including but not limited to, inferring that the testimony of Complainant would have been adverse to Complainant, ruling that the testimony of Complainant is established to be adverse to Complainant, ruling that Complainant may not rely on his testimony in support of his claim, ruling that Complainant may not object to the introduction and use of secondary evidence to show what Complainant's testimony would have shown should he not appear for his deposition, or render a decision of the proceeding be rendered against Complainant. The undersigned requested that Complainant take note that the undersigned is considering assessing sanctions against Complainant due to his failure to cooperate in the prosecution of his claim and to follow orders of the undersigned Administrative Law Judge.

The pre-trial order provided the parties with further instruction on the content of their prehearing statement, directing that the prehearing statements be prepared according to 29 C.F.R. § 18.7(b) and submitted to the undersigned by September 2, 2003. A prehearing conference call was scheduled for 9:00 am on September 5, 2003. The parties were informed that the formal hearing was to begin at 9:00 am on September 9, 2003. Following the admission of exhibits, which were to be marked, indexed, and exchanged between the parties, each party was informed that they would

be permitted to make a fifteen-minute opening statement confined to offering into evidence and identifying the exhibits that each party intended to rely upon in support of their case.

On September 2, 2003, Respondent faxed a prehearing statement to the undersigned, which complied with 29 C.F.R. § 18.7(b). That same day, Complainant faxed to the undersigned a document entitled "Mark E. Howick's Motion to Bifurcate Trial and Prehearing Statement." Complainant first moved to bifurcate the liability phase of trial from the remedies and damages phase of trial.[3] Complainant's prehearing statement identified eight witnesses that Complainant would call, fourteen witnesses Complainant may call, and reserved the right to call rebuttal, impeachment, and other witnesses, including every single one of Respondent's witnesses in his own case in chief. Complainant's prehearing statement also contained an updated exhibit list. Beginning on page 8 and continuing to page 22 of Complainant's prehearing statement, under a heading of evidence overview, Complainant inserted text that was word-for-word the same as his motion for partial summary judgment, except for a few sections that had been expanded. Counsel for Complainant also faxed a letter to the undersigned on September 2, 2003 requesting the issuance of separately enclosed subpoenas for fourteen individuals.

On September 4, 2003, the undersigned's legal technician, received several phone calls from counsel for Respondent and counsel for Complainant. The parties wanted to speak to the undersigned regarding Complainant's deposition. Since the undersigned was conducting hearings in Kentucky, the parties agreed to hold a conference call with Mr. Hoffman in order to present him with their concerns. The parties informed my attorney-advisor that Complainant's deposition

had begun on September 3, 2003 as scheduled. The deposition was recessed around 6:00 pm on September 3, 2003. Complainant's deposition was renewed on the morning of September 4, 2003. At some point that afternoon, Complainant indicated that he could not continue his deposition because he was feeling ill because he had not taken his recently prescribed medication. The parties indicated that they had reached an agreement on how to proceed. The parties indicated to my attorney-advisor that Complainant's deposition was going to be recessed for the day. The parties were then going to travel to the offices of Respondent where Complainant was going to conduct informal interviews or review documents to be produced by Respondent. Counsel for Respondent agreed to produce a management employee of Respondent for a deposition on the morning of September 5, 2003. Upon the completion of that deposition, the deposition of Complainant was to be concluded. There was a discussion regarding rescheduling the prehearing conference from September 5, 2003 to September 8, 2003. Counsel for Complainant then informed my attorney advisor that he would contact my legal technician about his outstanding subpoena requests. My attorney-advisor informed counsel for Complainant of the undersigned's procedure for requesting subpoenas. Counsel for Complainant responded that he intended to complete the subpoena forms and indicated that he would like for the undersigned to send the completed subpoena's to Complainant's residence in Dayton, Ohio. Following a discussion with the undersigned, my attorney-advisor left messages with counsel for both parties rescheduling the September 5, 2003 prehearing conference to September 8, 2003 to accommodate the parties discovery agreement.

The undersigned received a fax transmission from counsel for Complainant at 4:02 pm on September 5, 2003 that

included a subpoena request for documents or objects in the possession of Respondent, as well subpoena requests for thirteen individuals. The parties again requested a conference call with attorney-advisor, since the undersigned was not available. The parties informed my attorney-advisor that the deposition of Craig Conrad, an employee of Respondent, had begun in the morning and concluded around 4:00 pm. Counsel for Respondent was then going to conclude the deposition of Complainant.

During the discussion, counsel for Complainant requested that the undersigned issue an order requiring counsel for Respondent to designate a representative to observe while counsel for Complainant reviewed documents in the possession of Respondent at Respondent's offices on the evening of Friday, September 5, 2003 and on Saturday, September 6, 2003. Counsel for Respondent brought multiple boxes of documents with him to the deposition of Mr. Conrad. It was unclear to my attorney-advisor whether the boxes were given to Complainant, or whether Complainant was simply allowed to inspect the contents of the boxes during Mr. Conrad's deposition. My attorney-advisor then contacted the undersigned, informing the undersigned of Complainant's oral motion. He then communicated to the parties the undersigned's denial of Complainant's motion. The parties were instructed to address any unresolved discovery issues during the prehearing conference scheduled for 9:00 am on September 8, 2003.

At the end of the conference call, counsel for Complainant asked my attorney-advisor if he had received a facsimile from Complainant that was to provide the address for overnight delivery of the Complainant's subpoena requests. My attorney-advisor stated that he had not received such a transmission. Complainant then provided him with the

address of a Red Roof Inn hotel in Michigan where he desired to have the subpoenas sent to by overnight mail. With authority granted by the undersigned, Administrative Law Judge Joseph Kane signed the fourteen subpoena requests of Complainant on September 5, 2003. The subpoenas were then prepared and delivered to Federal Express by Office of the Administrative Law Judge staff for overnight delivery.

At 9:47 pm on Sunday, September 7, 2003, counsel for Complainant left a voicemail message for my attorney-advisor. He provided the telephone number where he could be reached for the September 8, 2003 prehearing conference. Counsel for Complainant also stated the following:

> We were in Detroit until we checked out of the hotel, I guess around 12:45 p.m. today. The subpoenas never arrived. Mr. Howick had a panic attack, an anxiety attack. At first we thought it was a heart attack. He was in the Emergency Room at Kettering Hospital here in Dayton for several hours, so we would appreciate it if you all could be a little kinder and gentler to Mr. Howick. The judge was just a little bit rough on him the last time I thought, especially that remark about working through the tears, which I have never heard a DOL judge behave that way toward a party before, especially a party who just had an attorney who lost a father, and I have been associated with the Department of Labor, Office of the Administrative Law Judges since I clerked for Judge Rithey and Judge Litt in 1986. And I was quite frankly ashamed that the judge talked that way. But anyway, could you let the judge know that Mr. Howick was hospitalized today and if he could be a little nicer to him, maybe, we would really appreciate that. Thank you and good night.[4]

The undersigned conducted a prehearing conference call on September 8, 2003. At the outset, counsel for Complainant

asked if a court reporter was present to transcribe the conference call. Upon being informed that there was indeed no court reporter, counsel for Complainant requested permission to record the conference call. The undersigned denied Complainant's request, noting that it was not his practice to record prehearing conferences, and it was not required by any provision in 29 C.F.R. § 18.8. Counsel for Complainant stated that they had not received the subpoenas at their hotel over the weekend. The undersigned provided Complainant with the option of picking the subpoenas up from the undersigned's office that day, if not, the undersigned would bring the subpoenas to the hearing. The parties informed the undersigned that the deposition of Complainant had been completed. After being informed of the manner in which discovery was conducted by the parties during the prior week, the undersigned stated that he was considering assessing sanctions against both parties. Complainant was informed that he was dangerously close to having his complaint dismissed. Respondent was warned that the undersigned was considering assessing sanctions related to the discovery process.

During the conference, the undersigned denied Complainant's motion to bifurcate the trial. The undersigned also struck from the record pages 8 through 22 of Complainant's prehearing statement because counsel for Complainant incorporated, expanded upon, and used a substantial portion of Complainant's motion for partial summary judgment in direct violation of the undersigned's prior order rendered during the August 28, 2003 conference call. The parties informed the undersigned that they had not reached an agreement on the order and presentation of witnesses. Counsel for Complainant voiced his intent to call all witnesses listed in his prehearing statement during Complainant's case in chief, as well as all witnesses on

Respondent's witness list. Counsel for Respondent requested that the undersigned order Complainant to be called as Complainant's first witness to avoid delay. The undersigned denied Respondent's request. Counsel for Complainant indicated that he could work with counsel for Respondent to reach an agreement by the beginning of the hearing on the order and presentation of witnesses. Respondent designated John Schroeder as its representative. Counsel for Complainant stated that Mr. Schroeder would be his first witness.

At 4:27 pm on September 8, 2003, Respondent faxed to the undersigned a motion to quash subpoena of Louis Bridenstine, brief in support of motion to quash, motion to quash the subpoenas of J.Hadsell, T. Schwartz and G. McClone, and a brief in support of motion to quash. Respondent moved to quash the subpoena of Louis Bridenstine on the grounds that they had not been served with a valid subpoena bearing the signature of the Administrative Law Judge and the embossed seal of the Department of Labor, and because the witnesses had not received the witness fee and mileage reimbursement required by law in advance of the date of trial. Respondent moved to quash the subpoenas to J.Hadsell, T. Schwartz, and G. McClone for the same grounds and because all three individuals reside, work and conduct business outside of the state of Ohio and more than 100 miles from the Montgomery County Courthouse where the trial was scheduled.[5]

The formal hearing on this matter began as noticed at 9:00 am on September 9, 2003. Edward Slavin, Esq. appeared on behalf of Complainant and Fred Batten, Esq. appeared on behalf of Respondent. Pursuant to 29 C.F.R. § 18.8, since the prehearing conference occurred within seven days of the hearing, the undersigned elected to make a statement on the

record summarizing the actions taken during the prehearing conference. The undersigned stated that there was not a stenographic recording or court reporting of the prehearing conference because it was his practice for them not be recorded, additionally, the undersigned noted that there was no request. The undersigned discussed his questioning of the parties about the status of Complainant's deposition, to which counsel for Respondent stated that it had been completed at around 6:15 pm on September 5, 2003. Counsel for Respondent also verified that six to eight boxes were made available to Complainant for inspection on September 5, 2003, but Complainant was not permitted to keep the documents. Complainant noted for the record that he was only permitted two-hours to inspect what he described as "tons of documents." The undersigned stated at the hearing, on reconsideration of his admonishment of Respondent for not leaving the documents with Complainant, that since the deadline for completion of discovery had long since passed, that Respondent may not have been obligated to make those documents available to Complainant since the documents had previously been made available to Complainant, and that Complainant did not avail himself of the opportunity to inspect the documents. The undersigned stated that Complainant did not diligently work to make himself available for his deposition, unnecessarily delaying the process of discovery through his failure to appear at three previously scheduled depositions.[6]

Interrupting the recitation of the events that occurred during the prehearing conference, the undersigned again informed Complainant that he was withholding an order of dismissal, but cautioned Complainant that sanctions were being considered, and that if the presentation of Respondent's case was materially affected by Complainant's actions during discovery, that a motion to dismiss would be reconsidered.

However, the undersigned that stated, "[n]ow I intend to proceed here this morning with what we have, and I'm going to continue my review of the prehearing conference." The undersigned then proceeded to discuss the admission of exhibits, presentation of witnesses, and the subpoenas that had been requested by Complainant. The parties were then permitted to address issues the undersigned omitted from his recitation of the prehearing conference. Counsel for Complainant took the opportunity to make a plea, under a Fourth Circuit Court of Appeals case 29 C.F.R. § 18.29, to have the undersigned order the Respondent's to bring to the hearing the documents that Complainant requested during discovery that Complainant had been unable to copy and inspect. The undersigned declined to order the production of documents as a sanction against Complainant due to Complainant's material failure to make himself available for deposition. The undersigned stated that any failure on the part of Respondent to produce documents during discovery would be a separate sanctions issue. Complainant's exception to the undersigned's ruling was noted. The undersigned then stated "that the Complainant is in this courtroom proceeding with this case by the skin of his teeth, and now I want to proceed and get to the heart of this matter, and I want no more fooling around with concepts of discovery belatedly here." The undersigned then directed counsel for Respondent to bring whatever documents that had been made available to Complainant to the courthouse. The undersigned then stated that a separate proceeding on the record would be held, after the entire case was heard, on the matter of sanctions related to discovery abuses.

At this point in the hearing, the undersigned said "[l]et's go to the exhibits," and asked Complainant to offer his exhibits. Counsel for Complainant then moved into evidence all of the parties' exhibits, "both Complainant's and Respondent's."

Complainant then listed Respondent's exhibit numbers. The undersigned then stated to Complainant, "[t]ell me your exhibits." Counsel for Complainant relied, "Yes, Your Honor. The Complainant's exhibits are numbered." The undersigned asked for an index of Complainant's exhibits, which was provided. Counsel for Complainant stated that Complainant's exhibits were essentially the same as the exhibits that were attached to Complainant's motion for partial summary judgment, except for a correction to a couple of the entries and the addition of exhibit 34. The undersigned then asked Complainant if his exhibits were bound for trial, noting that he had Complainant's exhibits from his motion for partial summary judgment. Counsel for Complainant stated that Complainant was going to supplement the exhibits from his motion for partial summary judgement "with 34 and some of the others and double-check if we could borrow Your Honor's book back tonight?"

The undersigned informed Complainant that he did not understand Complainant's process for offering exhibits, and then asked Complainant is he was asking the undersigned to utilize the summary judgment exhibits as exhibits in this proceeding. Complainant responded, "[y]es," to which Respondent raised an objection. Respondent objected because specific documents had not been identified, asserting that Respondent did not have knowledge of what documents Complainant was actually relying upon.

Counsel for Complainant cited to *Seater v. Southern California Edison* to argue that the undersigned was required to "let everything in." At this point in the hearing, the undersigned stated that he did not like the manner in which the hearing was proceeding, and then asked Complainant whether the parties had "talked for one moment with each other about your exhibits here today;" counsel for

Complainant responded that there had been no discussion among the parties prior to the hearing about exhibits. Complainant then offered into evidence Complainant's exhibits 1 through 25, 27 through 31, and 34, which were all marked for identification. Complainant reserved Complainant's exhibits 26, 32, and 33 for "[t]he ones that are reserved but are not present yet because they don't exist yet." Counsel for Respondent then listed whether or not he had an objection to each of Complainant's exhibits from 1 to 11. Counsel for Respondent then alleged that he did not have copies of Complainant's exhibits from 11(a) onwards. The following exchange then occurred between the undersigned and counsel for the parties:

JUDGE PHALEN: Well, I want you to listen to - you're saying all through 34 - 12 through 34 that you don't have a compiled presentation of those documents?

MR. BATTEN: That's correct.

JUDGE PHALEN: Do I?

MR. SLAVIN: I believe you do, Your Honor. They were served but again, we will have an extra book. We have additional copies here if anyone needs them. They were sent after the summary judgment exhibits in several batches.

MR. BATTEN: Are they marked?

MR. SLAVIN: They should be, yes, and we have new notebooks as well. They should be in the Judge's notebook.

JUDGE PHALEN: Can you-

MR. SLAVIN: I think it's on the corner of the bench, Your Honor, to Your Honor's right at the very corner in the black notebook. Is that it?

JUDGE PHALEN: Well, this goes through 25.

MR. SLAVIN: Okay.

MR. BATTEN: I don't have a copy of any such notebook, nor was I served with anything like that.

MR. SLAVIN: I don't believe Mr. Batten was served with

a notebook. I think he was served with several batches of documents.

MR. BATTEN: And I would like to see some kind of a proof of service or something like that because I don't think I have been.

MR. SLAVIN: Mr. Howick has it.

JUDGE PHALEN: Do you have these?

MR. HOWICK: Yes, sir, I do. I just ran out of time. I actually put that book together, sir, and federal expressed it at 9 o'clock in the parking lot. And what I tried to do is send Mr. Batten, with proof of service pages, segment by segment as I followed up as I got to Kinko's and got those copied, and I also have your notebook here but I just haven't had time to assemble it all.

MR. SLAVIN: And just for the record we apologize for an inconvenience, but Mr. Howick had to go Sunday evening to the emergency room due to an anxiety of panic attack that was originally thought to be a heart attack.

JUDGE PHALEN: These were - you have my utmost sympathy - but these were required to be here.

MR. SLAVIN: They're here.

JUDGE PHALEN: They were required to be here before this.

MR. SLAVIN: Right. They were served.[7]

JUDGE PHALEN: We're not supposed to be wrestling with these at the hearing and where are they. Pass out to Mr. Batten and to me whatever documents we're supposed to have in an order that we don't have to be sorting them.

MR. SLAVIN: Yes, sir. I apologize.

MR. SLAVIN: This is a complete book for the Court. May I approach the bench?

JUDGE PHALEN: Yes. Have you got Mr. Batten's?

MR. SLAVIN: He is getting it, Your Honor.

MR. BATTEN: And, Your Honor, I don't know how that

can be a complete book because, I mean, one of the books - one of the things that they wanted to introduce is 5(b) or something like that which is 250 pages, and another one is 5(c) which is another 250 pages.

MR. SLAVIN: Your Honor -

JUDGE PHALEN: I think we are going to get -

MR. SLAVIN: we were in depositions and he made a point that he had some objections somehow and somewhere to part of CX 5(a) and CX 5(b). I asked him what pages and he gave me a look. They don't have any specific objections to any portion of CX 5(a) and CX 5(b). Therefore, we would ask the Court -

JUDGE PHALEN: Right now. Right now. Right at this moment I want to see the copies that I have, and I want to see the copies that Mr. Batten is supposed to have. Get them to him.

MR. SLAVIN: Okay.

JUDGE PHALEN: I'll note for the record that Mr. Howick is putting documents together for distribution.[8]

MR. SLAVIN: The documents that were previously served on Mr. Batten, and we're getting him another set.

JUDGE PHALEN: I'm talking about the exhibits for this proceeding as properly marked and exchanged.

MR. SLAVIN: And again we're talking -

JUDGE PHALEN: The fact that they were previously given does not affect me at this moment. What I want is marked documents in my hands and in Mr. Batten's hands, and I don't want to talk about what he may or may not have in the past.

MR. SLAVIN: Would this be a good time for a recess, Your Honor?

JUDGE PHALEN: No. We're going to stay on the record until this is done.

MR. SLAVIN: So is the Court requiring that multiple copies of the exhibits be given to the Respondent?

JUDGE PHALEN: I want - I want organized copies delivered. I would take as a substitute an organized set up to that certain point. I thought I was working with Claimant's exhibits off of the motion for summary of judgment, and then I have been requested to take those. Is that what your request was?

MR. SLAVIN: Yes, and there are also some supplemental exhibits as well.

JUDGE PHALEN: What about Mr. Batten? Get those documents together and give them to him.

MR. SLAVIN: Yes, sir. And again they were previously served on Mr. Batten.

JUDGE PHALEN: All right. I want you to stop talking right now.

(Pause.)[9]

MR. SLAVIN: Your Honor, may I make an observation at this point?

JUDGE PHALEN: No. You have a motion?

MR. SLAVIN: A motion to take judicial notice of the fact that during the depositions we asked Mr. Batten to tell us what he did and did not have, and tried to work with him on exhibits as we tried to work with him on the witnesses. We wanted to schedule the witnesses to cause the minimum inconvenience to their managers, and to give them a schedule, and likewise on the exhibits

MR. BATTEN: Is this what you are - go ahead and finish your motion.

MR. SLAVIN: at any rate we ask the Court to take judicial notice that this could have been avoided. We understand the Court being angry.

MR. BATTEN: Is this 5(b)?

MR. SLAVIN: Yes.

MR. BATTEN: Are you sure?

MR. SLAVIN: Yes.

JUDGE PHALEN: It's denied.

MR. SLAVIN: This was the first one, Mr. Batten. That is the first one I federal expressed to your office, and I put a label on your copy of CX 5(a) during the deposition. (Pause.)[10]

MR. BATTEN: May I speak, Your Honor, with respect to Exhibits 5(a) and 5(b)?

JUDGE PHALEN: Yes.

MR. BATTEN: Exhibits 5(a) and 5(b) constitute, I believe, the total document production of the Complainant in this case. If the purpose of having trial exhibits is to assist the parties in knowing what documents are going to be discussed with witnesses and which documents are particularly relevant, this does no good at all. This would be similar if I were to say: "Okay. Every Campbell-Ewald document will be marked Exhibit 1." It doesn't - this does not identify to me exhibits that are going to be used at trial. I believe that a party, if they are going to have exhibits, has to introduce each document separately so that we know what we are talking about.

JUDGE PHALEN: What is your response to that, Mr. Slavin?

MR. SLAVIN: Your Honor, they did not object to a single page of CX 5(a) or CX 5(b). The pages are numbered. They have had them for a long time. We asked them if you have any objections to any particular page, or any particular document, we would like to know so that we can take it up and have a stipulation. They did not do so. As a result, they are just objecting for the purpose of objecting. We would, for the record, renew Mr. Howick's motion for partial summary judgment since the predicate has been laid. He has given his

deposition, and the Respondent has not disputed any of the contentions in the motion for partial summary judgment, or any of the exhibits in that motion including these two. And we attempted to pierce the filings and the pleadings, and to get the matter before the Court so that we could have just a trial on damages, or just a trial on those issues upon which there was a genuine issue of material fact. The Respondent never identified so much as one genuine one issue.

JUDGE PHALEN: Mr. Slavin, do not argue your motion for summary judgment to me again.

MR. SLAVIN: I wasn't arguing. I was just renewing it.

JUDGE PHALEN: Do not raise it or argue it as you had. You are repeating your motion for summary judgment. I have denied it. I'm not going to entertain it at this time. You are the one that is not prepared here at this hearing.

MR. SLAVIN: We're prepared to examine the first witness.

JUDGE PHALEN: You are not prepared here at this hearing to do what I want done now with the exhibits.

MR. SLAVIN: May we have a short break?

JUDGE PHALEN: Why?

MR. SLAVIN: So that Mr. Howick can finish assembling the extra copy of the exhibits for the Respondent.

JUDGE PHALEN: And how - what do you mean extra copy? It's not an extra copy to me. To me, it is the exhibits that belong to both my bench and to the opposing party.

MR. SLAVIN: Previously served except for CX 34, sir.

JUDGE PHALEN: No, not previously served. I'm not accepting that. You have exchanged documents but they haven't been designated as exhibits.

MR. SLAVIN: They had exhibit labels on them and they were exchanged. I don't understand, Your Honor. I just don't understand.

JUDGE PHALEN: The delay you should understand.

MR. SLAVIN: Your Honor, it seems -

JUDGE PHALEN: We are at a point in this proceeding where we are dealing with the identity and numbering of exhibits that should have been marked and exchanged by the prehearing conference. They weren't.

MR. SLAVIN: They were, Judge.

JUDGE PHALEN: Mr. Batten, did you know what exhibits he had submitted to you?

MR. BATTEN: No, Your Honor. He had filed - he has filed a motion for partial summary judgment where he has designated various documents that had been served in discovery, and I have received in discovery those documents marked 1 through 11 but they were not marked as exhibits when I first received them.

JUDGE PHALEN: As trial exhibits?

MR. BATTEN: That's correct.

JUDGE PHALEN: Were you told they were going to be trial exhibits?

MR. BATTEN: Well, I know now by virtue of the fact in his Prehearing Order that he designated certain documents that he wanted them to be trial exhibits, but I was not served with copies at that time as being the actual trial exhibits that he would introduce.

MR. SLAVIN: Your Honor, I think this is some hair splitting. These were served with exhibit labels. They knew they were trial exhibits. Mr. Howick has the proof of service. They are not denying they received it. If they want another book, Mr. Howick is preparing it right now, but we are prepared

JUDGE PHALEN: What about after 12?

MR. SLAVIN: After 12 in several segments, Mr. Howick, as the exhibits became available, and were prepared served

them, and there is proof of service on those.

MR. BATTEN: Let me speak, Your Honor. Number one, Mr. Slavin is counsel. It's not Mr. Howick's duty to be serving documents number one, and number two

MR. SLAVIN: Your Honor, that is none of their business.

JUDGE PHALEN: Stop. I'll address you when it's time. I'm listening to Mr. Batten.

MR. BATTEN: And secondly, I do not believe that I have been served with any exhibits marked after Exhibit 11. I don't believe that I have a copy of Exhibit 11(a), and I don't believe that I have a copy of any other marked exhibit

JUDGE PHALEN: After 12?

MR. BATTEN: Including 12. I don't have 12.

MR. SLAVIN: Then -

JUDGE PHALEN: As an exhibit?

MR. BATTEN: Correct.

MR. SLAVIN: Your Honor, if that were the case, then why during depositions last week on Wednesday, Thursday, Friday, this weekend, yesterday or this morning, did Mr. Batten never tell us in response to our specific question that he lacked any of the exhibits? We asked him: "Do you have everything that is on our prehearing exchange document?" Let me point out, Your Honor, that I was in New Jersey for my father's funeral, and I cannot be in two places at once, and Mr. Howick has the right, and he is the party, and I designated him to serve the exhibits that we identified. The Certificate of Service sheets are here, Your Honor, Mr. Howick's copy, and we can make copies and provide the Court with copies of these documents but they were served.

MR. BATTEN: Just for the record, Your Honor, I would be willing to go back and look at that deposition transcript because I believe

MR. SLAVIN: It wasn't on the record, Your Honor.

We did not clutter the record.

MR. BATTEN: Well, I believe that there is something on the record about the -

JUDGE PHALEN: Stop for a moment.

COURT REPORTER: Excuse me, Your Honor. They need to speak one at a time. I'm not picking up Mr. Slavin.

JUDGE PHALEN: One at a time.

MR. BATTEN: I believe that there is something on the record when the question of Exhibit 5(a) came up and I said: "Don't mark it because I was having a problem with a binder which incorporates all kinds of different documents, and saying that that is going to be a trial exhibit." It is not a trial exhibit. These things have facsimiles to OSHA. They have copies of web pages from OSHA. They have all kinds of different things in them.

MR. SLAVIN: And again, I asked Mr. Batten, Your Honor, during the deposition and perhaps he is right. The discussion on 5(a) and (b) might even be in the transcript, and we would be happy to pull it up for Your Honor if you want to see it?

JUDGE PHALEN: Well, I'm looking facially at (b), and these look like a bunch of unrelated documents.

MR. SLAVIN: They're supplemental exhibits, and there has not been any objection to any specific page.

JUDGE PHALEN: Well, there is an objection here today.

MR. SLAVIN: To what page?

JUDGE PHALEN: There is an objection to Exhibits 5(a) and 5(b).

MR. SLAVIN: Well, if there is an objection it needs to be a specific page, Your Honor.

JUDGE PHALEN: I think the objection stands that these are unrelated documents. I just glanced through it. That is an appropriate statement. I hate to do this but I am granting the motion to dismiss for failure to prosecute this matter.

MR. SLAVIN: May we be heard, Your Honor?

JUDGE PHALEN: I will now give you five minutes each to state - Mr. Batten, I want you to state why the matter should not be granted, the motion to dismiss, and Mr. Batten may respond.[11]

Counsel for Complainant responded as follows:

MR. SLAVIN: Does the Court have any questions before I begin?

JUDGE PHALEN: No.

MR. SLAVIN: May it please the Court Mr. Howick has endeavored to cooperate in discovery and has done so. The record will so reflect. He gave his deposition. He was there from day to day. He did what the Court ordered. He served upon the Respondent and the Court his exhibits. He filed a motion for partial summary judgment which was non disputed. He is prepared to prosecute his case. He has not done anything wrong. The Respondent has not identified anything that Mr. Howick did wrong. The Court has not identified anything that the Respondent has done wrong. The Respondent is hostile toward protected activity. The Court has been hostile toward protected activity.[12] The fact that Mr. Howick and his counsel have criticized OSHA, or the fact that Eugene Scalia, the former Solicitor of Labor, might hate Mr. Howick's counsel, or the fact that OSHA might dislike the fact that Mr. Howick's counsel has criticized DOL, or the fact that Mr. Howick's counsel has raised concerns throughout the land with respect to DOL's desuetude, D-E-S-U-E-T-U-D-E, is not grounds for dismissal. The fact of the matter is that Mr. Howick is here ready and able to prosecute his case notwithstanding his own parents' poor health, notwithstanding the fact that his counsel's father has just died within the past month, and notwithstanding the fact that he didn't even ask for a continuance. No one has asked for a continuance. We are here today. We were denied full and fair

discovery. Mr. Howick has not been able to discover, and has not been able to read and learn about the Respondent's accidents during the Olympic torch relay, accidents that were the direct result of truck driver fatigue. In fact, in this case, the evidence is unrefuted and the Court has been invited to commit error.

JUDGE PHALEN: Okay. Arguing the case is out of order.

MR. SLAVIN: What would you like me to say, Your Honor?

JUDGE PHALEN: I'm not here to argue the case. We're solely addressing the motion to dismiss for what I consider to be the material failure of the Claimant to be prepared to present his case.

MR. SLAVIN: But he is, Your Honor, and about an hour ago you said you were going to try this case.

JUDGE PHALEN: You know, that's a statement that was already subject to the motion to dismiss that I told you you were really at the brink. You apparently don't believe those things. I told you it was hanging by a thread. Now saying that we're going to proceed is not some kind of a new ruling. It is attempting to get the case on, and

MR. SLAVIN: May I call the first witness?

JUDGE PHALEN: No, you may not. Was your statement may I call the first witness?

MR. SLAVIN: Yes, Judge.

JUDGE PHALEN: The answer is no.

MR. SLAVIN: The Respondent has blocked Mr. Howick's efforts to obtain justice every step of the way from OSHA to OALJ. This is the largest most powerful agency on this planet in a public group which is currently under SEC investigation. It has sandbagged Mr. Howick. It has made discovery abuse positions throughout this case. We have discovery responses that Your Honor hasn't seen yet perhaps,

or hasn't had an opportunity to read but basically the case is admitted. We have undisputed evidence, and there is nothing that Mr. Howick did wrong. He gave his deposition. Initially, it was agreed that the deposition was going to be on the 20th of August. He gave his deposition on the 3rd, 4th and 5th of September. He didn't have time to take the 10 depositions or employee interviews that Your Honor ordered he had a right.

JUDGE PHALEN: Okay. Your time is up.

MR. SLAVIN: Thank you, Your Honor. Thank you for your consideration.

Respondent, in his response, alleged that Complainant had failed to produce tapes containing recordings of certain conversations with and messages left by Respondent's witnesses. Complainant was permitted a two-minute time period for rebuttal. Counsel for Complainant, upon being asked during his rebuttal to answer with a "yes" or a "no" by the undersigned to the question of whether Complainant refused to produce the tapes that Respondent requested, stated "[w]e declined. We didn't refuse." Respondent then filed with the undersigned a copy of Complainant's deposition transcript. Complainant then renewed his request to have Respondent bring certain documents to the courtroom, which the undersigned denied since Complainant's claim had been dismissed. Complainant requested a recess, which the undersigned denied. Complainant then asked the undersigned to disclose any communication the undersigned had with Judge John Vittone, Judge Thomas Burke, or Todd Smith, asserting that Judge Vittone's hostility towards protected activity by counsel for Complainant and former Chief Judge Nahum Litt had caused the undersigned to be prejudiced against Complainant. Complainant then requested that the undersigned recuse himself. The undersigned denied those requests. The undersigned then stated:

JUDGE PHALEN: My observation here today is that you are not ready to proceed. You've come in here with documents which were supposed to have been marked as exhibits that were not marked as exhibits. There are stacks of them over there. Mr. Batten has not been served precisely with what is going to be the exhibit. I have not been. I had to fish in the beginning to see if these were the documents related to the summary judgment motion. In my opinion, you are not prepared. And when I look at this Exhibit 5(a) as being a collection of documents that aren't designated and 5(b), it reinforces my position. If we go through with this hearing, we are going to be sorting out documents ad infinitum, and it is my observation that you are not ready to proceed.

MR. SLAVIN: Motion to -

JUDGE PHALEN: You have not followed the orders of my -- of this Court.

MR. SLAVIN: Motion to continue until 1:00 p.m.

JUDGE PHALEN: Stop interrupting me. Do not interrupt me. I believe that there has been a material failure to participate in the discovery and I stated the reasons why in my order. Nothing has happened since my order to reverse that. I believe also that Respondent has caused a failure to produce documents that stand on their own and for which I intend to issue sanctions and that, however, is a separate matter as I stated at the outset of this hearing from the chain of events that are involved with regard to the failure to produce Mr. Howick for a deposition. This matter by ardent attempts by counsel to get together to do the deposition early on could have been handled.

The undersigned informed Complainant that he had violated the undersigned's prehearing orders regarding preparation for the hearing. The undersigned declared that Complainant was not prepared to prosecute his case in

accordance with the undersigned's prehearing orders and directives. The undersigned then invoked Respondent's motion to dismiss, which the undersigned had reserved ruling on for the outset of the trial. The undersigned ruled that Complainant had failed to prosecute his case. The undersigned ordered that Complainant's claim be dismissed for a failure to prosecute.

Additionally, the undersigned provided the parties with thirty-days in which to file briefs responsive to the issue of sanctions to be assessed in response to the discovery abuses that occurred in this matter.

Discussion and Applicable Law

29 C.F.R. § 1978, together with 29 C.F.R. § 18, implements the procedural aspects of the STAA. 29 C.F.R. § 1978.100(a), (b). Formal hearings on STAA complaints are to be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of the Administrative Law Judges promulgated at 29 C.F.R. § 18. 29 C.F.R. § 1978.106(a). The authority of an administrative law judge to conduct a fair and impartial hearing is set forth in 29 C.F.R. § 18.29. Generally, an administrative law judge is authorized to take any action authorized by the Administrative Procedure Act, take any appropriate action authorized by the Rules of Civil Procedure for the United States District Courts, and to do all other things that are necessary to enable the administrative law judge to discharge the duties of the office. 29 C.F.R. § 18.29(a)(6, 8, 9). Specifically enumerated in 29 C.F.R. § 18 are the powers of an administrative law judge, with regard to the motions and requests of parties, when a party or officer or agent of a party fails to comply with a subpoena or with an order of the administrative law judge. 29 C.F.R. § 18.6(d)2).

The specifically enumerated powers permit an administrative law judge to:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party;

(2) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(3) Rule that the non-complying party may not introduce into evidence or otherwise rely upon the testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(4) Rule that the non-complying party may not be heard to object to the introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown; or

(5) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or *that a decision of the proceeding be rendered against the non-complying party*, or both.

29 C.F.R. § 18.6(d)(2)(i-v) (emphasis added). It is evident that an administrative law judge has been granted the authority, where appropriate, to dismiss the complaint of a party who violates the orders of the administrative law judge. Therefore, it is important to determine when it is appropriate to dismiss the complaint of a party for failing to follow the orders of an administrative law judge.

The Administrative Review Board ("ARB") has affirmed an administrative law judge's decision to dismiss a complaint for failure to prosecute. *See Bacon v. Con-Way Western*

Express, ARB No. 01-058, ALJ No. 2001-STAA-7 (ARB Apr. 30, 2003). Bacon, the complainant, initially refused the administrative law judge's advice to obtain an attorney and requested a hearing as soon as possible. *Bacon* ARB No. 01-058, p. 2. Prior to going on the record the day of the hearing, Bacon engaged in an almost hour-long diatribe against the respondent and its witnesses. *Id.* At that point, the administrative law judge opened the hearing on the record and asked the parties if there were any preliminary matters to be addressed. *Id.* Bacon requested a continuance so that the administrative law judge could provide an attorney for him. *Id.* Since the administrative law judge had previously informed Bacon that he could not appoint an attorney for him, the administrative law judge attempted to proceed with the hearing. *Id.* Bacon then became disruptive, refused to proceed with his case, and "hurl[ed] invective and verbal abuse" at the administrative law judge and the respondent's witnesses. *Id.* When Bacon continued his "repeated abusive, belligerent, and irate behavior," after warnings from the administrative law judge, the administrative law judge adjourned the hearing and summoned United States Marshalls to escort Bacon from the courtroom. *Id.* The administrative law judge issued an order to show cause why Complainant's claim should not be dismissed. *Id.* Upon receiving a brief from Respondent in support of dismissal and a response from Bacon that the administrative law judge deemed "essentially [an] incomprehensible rant laced with invective against Respondent," the administrative law judge issued a recommended decision and order dismissing Bacon's complaint. *Id.*

In beginning their analysis, the ARB referenced their recent holding that "[c]ourt's possess 'inherent power' to dismiss a case for lack of prosecution." *Reid v. Niagara Mohawk Power Corp.*, ARB No. 00-082, ALJ No. 2000-ERA-23

(ARB Aug. 30, 2002), *citing Link v. Wabash Railroad Co.*, 370 U.S. 626, 630 (1962). However, the ARB recognized that a dismissal with prejudice is a severe sanction that defeats a litigant's right to access the courts, and that it should be used as a weapon of last resort and reserved for extreme circumstances. *Bacon*, ARB No. 01-058, p. 3. The ARB then identified to the factors that the federal circuit court of appeals, under which Bacon's claim arose, stated should be considered before a dismissal of a case for want of prosecution is warranted. *Id.* at 4. The ARB proceeded to analyze the administrative law judge's decision under those factors. Even thought the ARB acknowledged that in many cases dismissed for a lack of prosecution, the failure to prosecute resulted in a delay of months or even years, the ARB affirmed the administrative law judge's decision to dismiss the claim for failure to prosecute, noting that Bacon's totally unacceptable conduct and the absence of the expression of an apology or avowal to conform his conduct to an appropriate standard in the future was an additional factor that tips the balance in favor of dismissal. *Id.* at 4, 5.

Complainant resides in Ohio and Respondent's offices are headquartered in Michigan, both of which fall under the appellate jurisdiction of the Sixth Circuit Court of Appeals. However, Complainant was terminated in Kansas, which is under the Tenth Circuit Court of Appeals. The Sixth Circuit Court of Appeals considers four factors in assessing the appropriateness of a decision to dismiss a complaint for failure to prosecute: (1) whether the party's failure is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the dismissed party's conduct; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less drastic sanctions were imposed or considered before dismissal of the action. *Mulbah v. Detroit Bd. of Educ.* 261 F.3d 586, 589 (6th Cir. 2001)

(finding that district court abused its discretion by dismissing suit, and stating that an alternative sanction should have been employed that would have protected the integrity of the pre-trial procedures even though the plaintiff and her counsel could have proceeded in a more timely and professional fashion).[13] No single factor controls an inquiry into whether a judgment dismissing an action for failure to prosecute was proper; dismissal is permitted "where there is a clear record of delay or contumacious conduct on the part of the plaintiff." *Mulbah*, 261 F.3d at 591. The Sixth Circuit found dismissal to be improper absent notice that dismissal is contemplated or a record showing bad faith. *See Wright v. Coca-Cola Bottling Co. of Memphis*, 41 Fed.Appx. 795 (6th Cir. 2002), *citing Vinci v. Consol. Rail Corp.*, 927 F.2d 287, 287-88 (6th Cir. 1991); *Harris v. Callwood*, 844 F.2d 1254, 1256 (6th Cir. 1988).

The Sixth Circuit has voiced its reluctance to uphold the dismissal of a claim merely to discipline an attorney. *See Coleman v. American Red Cross*, 23 F.3d 1091, 1094 (6th Cir. 1994). In fact, the Sixth Circuit has held that "[d]ismissal is usually inappropriate where the neglect is solely the fault of the attorney." *Carter v. City of Memphis, Tenn.*, 636 F.2d 159, 161 (6th Cir. 1980). The Sixth Circuit has reversed a dismissal, finding that the sanction was "extremely harsh in that it deprives a plaintiff of his day in court due to the inept actions of his counsel[.]" *See Patterson v. Township of Grand Blanc*, 760 F.2d 686, 688 (6th Cir. 1985) (implicitly finding that any potential claim a plaintiff may have against his inept attorney did not overcome the harm the plaintiff would suffer from dismissing the action). The United States Supreme Court has not been as reluctant to enforce a the dismissal of a plaintiff's complaint for the failures of his attorney. In *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Court upheld the district court's inherent

power to dismiss an action with prejudice when the plaintiff's attorney, who had a history of dilatory conduct, missed a pretrial conference without an adequate excuse. *Gripe*, 312 F.3d at 1189, *citing Link*, 370 U.S. at 633, 634. In *Link*, Justice Harlan wrote:

> There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Id. at 1189, *citing Link* at 633-34, 82 S.Ct. 1386 (internal quotation marks omitted). The Tenth Circuit in *Gripe* noted that the footnote from the above-quoted passage in *Link* explains:

> Clients have been held to be bound by their counsels' inaction in cases in which the inferences of conscious acquiescence have been less supportable than they are here, and when the consequences have been more serious. Surely if a criminal defendant may be convicted because he did not have the presence of mind to repudiate his attorney's conduct in the course of a trial, a civil plaintiff may be deprived of his claim if he failed to see to it that his lawyer acted with dispatch in the prosecution of his lawsuit. And if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice. But keeping this suit alive merely because plaintiff should not be penalized for

> the omissions of his own attorney would be visiting the sins of plaintiff's lawyer upon the defendant. Moreover, this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition.

Id. at 634 n. 10, 82 S.Ct. 1386 (citations omitted).

Despite recognizing dismissal of a claim for failure to prosecute as a harsh sanction, the Sixth Circuit also recognizes competing concerns that should guide a court considering a motion to dismiss. Specifically, the Sixth Circuit has identified the court's need to manage its docket, the public's interest in expeditious resolution of litigation, and the risk of prejudice to a defendant because the plaintiff has failed to actively pursue its claim. *Little v. Youter*, 984 F.2d 160, 162 (6th Cir. 1993). The Secretary, preserving the integrity and ethical manner in which administrative hearings are to be conducted, has upheld a dismissal of a complaint where the complainant failed to accept certified mail, had not responded to several orders issued by an administrative law judge, and had not responded to telephone communications. *See Cohen v. Roberts Express*, 1991-STAA-29 (Sec'y Feb. 11, 1992). The Secretary has also affirmed an administrative law judge's recommended dismissal of a complaint where the complainant did not comply with discovery and pre-trial orders. *See White v. "Q" Trucking Co.*, 93-STAA-28 (Sec'y Dec. 2, 1994).

The case law makes it clear - since dismissal of a complaint is such a harsh sanction that denies a party's right to access the courts, it is only appropriate as a matter of last resort in response to a party's record of delay or contumacious

conduct. The federal appellate courts prefer that dismissal be used to discipline an attorney, but rather to preserve the integrity of the court and to prevent prejudice to the opposing party, even though the Supreme Court's holding in *Link* remains valid law.

The record of delay and malfeasance of Complainant and his counsel warrants the dismissal of Complainant's claim. Complainant's deposition, which was originally noticed to begin on January 29, 2003, was not finally completed until September 5, 2003; four days before the hearing was to begin. The hearing, which was originally scheduled to begin on April 29, 2003, was rescheduled to begin on June 10, 2003, and then again rescheduled to begin on September 9, 2003. Complainant, while acting *pro se*, agreed to answer Respondent's interrogatories and requests for production of documents by February 24, 2003. Following several extensions of time based on Complainant's personal reasons, Complainant finally provided Respondent with answers to interrogatories and request for production of documents over six months later on August 8, 2003. Counsel for Complainant notified the undersigned on August 11, 2003 that his father had died, adding that he was "going to want to reschedule the depositions." Between August 11, 2003 and August 18, 2003, neither Complainant nor his counsel was able to effectively communicate to Respondent that Complainant was not going to appear for his deposition on August 19, 2003, and the deposition was only able to be rescheduled for September 3, 2003 by intervention of the undersigned on August 28, 2003. In fact, in response to the undersigned's attorney-advisor's question as to whether he intended to appear for his deposition, Complainant ignored the question, and instead chose to discuss his efforts to file exhibits with the undersigned in support of his motion for partial summary judgment.

When Complainant finally appeared for his deposition, he needed a recess during the afternoon of the second day of his deposition because he was feeling ill due to his failure to take his prescription medication. In addition to the delay Complainant caused by failing to take his prescription medication, Complainant and his counsel "declined to" produce tapes that Respondent had requested. In addition, upon review of volume one of Complainant's deposition, it is apparent that he delayed the completion of the deposition by providing lengthy responses. Counsel for both parties acknowledged to the undersigned's attorney-advisor that Complainant's lengthy answers were the reason for the length of the deposition.

Leading up to the hearing, counsel for Complainant repeatedly violated the undersigned's orders, including filing frivolous motions[14] , filing letters instead of motions with separate supporting memoranda, and by blatantly incorporating Complainant's motion for summary judgment into Complainant's prehearing statement. Additionally, Complainant requested fourteen subpoenas just after 4:00 pm on Friday, September 5, 2003, even though Complainant had been aware of all thirteen individuals who were subpoenaed and had listed such individuals on his prehearing statement that was filed with the undersigned on September 2, 2003. Despite the undersigned's order to the parties to have trial exhibits marked, indexed, and exchanged, Complainant appeared at the hearing without having exchanged marked and indexed copies of Complainant's exhibits.

As a result of the dilatory conduct of Complainant and his counsel, Respondent's was materially prejudiced: Respondent's procedural due process rights to mount a meaningful defense were compromised. Complainant, by delaying his deposition for over seven months and not finally

concluding his deposition until 6:15 pm on Friday, September 5, 2003, with the hearing set to begin on September 9, 2003, contributed to and therefore prevented Respondent from mounting a meaningful defense. Because of the time at which Complainant's deposition was finally completed, Respondent was prevented from developing or pursuing any evidence that may have arisen out of Complainant's deposition.

Complainant was first warned that the undersigned was considering dismissing his complaint during a telephone conference on August 28, 2003. The undersigned's admonishments were memorialized in an order dated August 29, 2003, wherein the undersigned reserved ruling on Respondent's motion to dismiss until the hearing, based in part on Complainant's attendance at and cooperation in completing his deposition. At the prehearing conference on September 8, 2003, the undersigned informed Complainant that he was dangerously close to having his claim dismissed. Complainant was again warned at the hearing that the undersigned would consider Respondent's motion to dismiss if the undersigned determined that Respondent was materially prejudiced by Complainant's delay in appearing for his deposition.

Beyond warning Complainant that his failure to cooperate could lead to dismissal, the undersigned also informed Complainant that he was considering the imposition of less drastic sanctions. The undersigned specifically identified the sanctions enumerated at 29 C.F.R.. § 18.6(d) as sanctions that were being considered to remedy the prejudice Respondent suffered as a result of Complainant's delay in appearing for his deposition. Although the undersigned had already granted two continuances of the hearing, Complainant did not request a continuance of the September

9, 2003 hearing until after the undersigned dismissed his claim. By reserving ruling on Respondent's motion to dismiss, the undersigned afforded Complainant a second chance at having his claim heard on the merits. At the hearing, the undersigned clearly expressed his intent to have this matter proceed to a full and fair hearing, urging Complainant to cease arguing over discovery matters and to offer his exhibits into evidence.

The undersigned did not dismiss Complainant's claim solely to discipline Edward Slavin, Esq. Complainant initially appeared *pro se*. He participated in all conference calls. However, for the last three or four conference calls, the undersigned had to order Complainant, who was represented by counsel, not to speak unless the undersigned asked him a question, due to the frequency of Complainant's previous interruptions. The undersigned reserved ruling on Respondent's motion to dismiss, predicating a final ruling on Complainant's attendance at and cooperation with the taking of his deposition on September 3, 2003. Even after Edward Slavin, Esq. appeared on his behalf, Complainant continued to maintain an active role. Complainant acted as a quasi-secretary and co-counsel to his counsel. For instance, Complainant assumed the responsibility for notifying Respondent that he would appear for the deposition scheduled for August 19, 2003. Respondent who apparently was not made aware that Complainant would not attend his deposition, contacted the undersigned's attorney-advisor to see if he could ascertain whether or not Complainant would attend his deposition on August 19, 2003. The undersigned's attorney-advisor asked Complainant whether he was going to attend through an email and a message left on Complainant's home answering machine. Complainant responded by email, but failed to answer whether or not he would attend. He chose, instead, to inform the undersigned's attorney advisor

of the personal challenges he faced in submitting documents to the undersigned and his sympathy for the family of his counsel. Complainant's personal inconveniences, health, and misfortune were repeatedly raised to excuse his attendance at properly noticed depositions, timely completion of answers to Respondent's interrogatories and request for production of documents, and for numerous extensions of time. Complainant's failure to take prescription medication resulted in the continuance of the second day of his deposition. Complainant blamed his lack of preparedness at the hearing on a panic attack he suffered on September 7, 2003 that allegedly required Complainant to be at a hospital for several hours. Complainant maintained an active role throughout the proceeding, and his personal reasons were the primary source of delay throughout the proceeding. The undersigned finds that Complainant demonstrated a reckless disregard for the effect of his conduct on this proceeding. His conduct thwarted Respondent's ability to mount a meaningful defense.

Despite the undersigned's admonishment, Complainant and his counsel continued the same pattern of behavior during the hearing. When asked to offer Complainant's exhibits into evidence, counsel for Complainant continued his dilatory behavior by offering into evidence Respondent's exhibits. The undersigned pressed Complainant to identify the exhibits he intended to introduce, yet counsel for Complainant was evasive. It quickly became clear to the undersigned that Complainant did not have a bound set of marked exhibits to provide to the undersigned and Respondent. In fact, Complainant himself was in the back of the courtroom organizing documents into exhibits. The list of Complainant's exhibits provided to the undersigned at the hearing identified 34 exhibits, while the book of exhibits provided to the undersigned at the hearing only contained exhibits up to 5C.

It is worthy of mentioning at this point that Complainant did not ever request that the hearing date of September 9, 2003 be rescheduled. Complainant represented that he would be ready to proceed on September 9, 2003. However, when the time arrived, Complainant was not prepared to begin. As usual, Complainant blamed his unpreparedness on a combination of personal reasons and Respondent's tactics. The undersigned viewed Complainant's lack of preparedness to begin the hearing coupled with his failure to request a continuance to be the quintessential straw that broke the camel's back. While any one action of Complainant and his counsel independently might not have warranted dismissal as a sanction, the overall effect of the dilatory and contemptuous behavior of Complainant and his counsel materially prejudiced Respondent's ability to mount a meaningful defense to Complainant's allegations, wasted the time and resources of the Office of the Administrative Law Judges, and offended traditional notions of fair play and substantial justice. The actions of Complainant and his chosen counsel led to congestion of the undersigned's calendar. The undersigned finds that the behavior of Complainant and his counsel warrants a dismissal for failure to prosecute, notwithstanding any failure of Respondent to provide discovery documents to Complainant in a timely and meaningful manner. Respondent's actions or inactions related to discoverable evidence in this matter will be addressed by the undersigned following the submission of briefs on the subject from the parties.

On or about 3:30 pm on September 17, 2003, while the present Recommended Decision and Order - Dismissal of Complaint was being prepared for filing, Complainant filed the following: (1) a letter entitled " COMPLAINANT MR. MARK E. HOWICK'S REQUEST FOR SUBPOENAS, MOTION TO ORDER *IN CAMERA* REVIEW AND

IMPOUND DOCUMENTS, MOTION FOR LEAVE OF COURT TO FILE MOTION TO RECONSIDER SEPTEMBER 9, 2003 ORDER DISMISSSING FOR "FAILURE TO PROSECUTE", AND COMPLAINANT'S SUGGESTION OF *SUA SPONTE* JUDICIAL RECUSAL."; (2) COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT AGAINST CAMPBELL-EWALD; (3) DECLARATION OF MARK E. HOWICK; (4) A suggested order of default judgment to be entered against Respondent; and (5) two subpoenas *duces tecum* requesting that Complainant be permitted to inspect and copy "[a]ll discover production documents requested by Mr. Howick, all microfilm, paper/electronic documents bearing his name and all privilege logs." The foregoing five documents were filed prematurely and have not evaluated by the undersigned before issuing this present Recommended Decision and Order - Dismissal of Complaint. Complainant may re-file the remaining documents in response to the present order, file new documents responsive to the present order, or avail himself of any action to which he is legally entitled.

Again, the undersigned stresses that his decision to dismiss Complainant's claim was not based on any one action or inaction. Rather, after considering the totality of the circumstances leading up to the hearing in conjunction with Complainant's lack of preparedness at the hearing, the undersigned determined at the hearing that dismissal was the appropriate sanction. Complainant was well aware of the fact that the undersigned was considering imposing sanctions against him. Complainant and his counsel were both culpable. The undersigned does not believe that an alternative sanction, such as ruling that Complainant is precluded from relying upon his own testimony, would adequately remedy the situation created by Complainant and his counsel. Not only did Complainant forestall the taking of

his deposition, he essentially precluded Respondent from pursuing any discoverable evidence that arose out of his deposition, most notably the recordings of conversations and voicemail messages that Complainant made but did not produce. Therefore,

IT IS RECOMMENDED that Mark E. Howick's complaint be dismissed.

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE: This Recommended Order of Dismissal and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 29 C.F.R. §§ 1978.109(a); 61 Fed. Reg. 19978 (1996). Pursuant to 29 C.F.R. § 1978.109(c)(2), the parties may file with the Administrative Review Board briefs in support of or opposition to the above-signed's decision and order within thirty days of the issuance of that decision unless the Administrative Review Board, upon notice to the parties, establishes a different briefing schedule.

[ENDNOTES]

[1] On August 11, 2003, Complainant addressed a letter to his counsel and attached a list of initial names for non-management interviews, which he also faxed to the undersigned and Respondent. The attached list and request for interviews was divided into two columns. Under column A, Complainant listed thirty-one individuals, "all non-management C-E 'warehouse' personnel, all 'commercial drivers' on the OTR tour project, dates specific - 30 days before, and after, all commercial drivers currently employed by the Respondent, all non-management 'security personnel' who staffed the front desk, front door, and any surveillance system the respondent [sic], all 'parking-lot' maintenance and cleaning staff, 30 days before, and after the time frame of the OTR project." Column B included "all respondent's 'vehicle maintenance & cleaning staff' for OTR vehicle,

for the specific time frame noted above, all of the respondent's 'night janitorial staff' and cleaning crew people for the specific time frame noted above, specifically, all those names of people who handled trash, and cleaned, C-E offices, more specifically, any and all persons who 'emptied corporate office, and equipment warehouse ash-trays and waste baskets,' any and all people who 'ran and operated' any kind of trash disposal unit, specifically any and all trash compactors, paper shredders, or fire incinerators, under the employment, sub-contract, direction and control of respondent, all 'airport shuttle drivers, and/or airport limo drivers,' transporting OTR crew and/or management, will supplement." At the bottom of the attachment, Complainant stated "Complainant and counsel respectfully request and reserve the right, under the unusual and extraordinary circumstances of Mr. Slavin's father passing to supplement."

[2] As set forth in footnote 2 to the undersigned's August 29, 2003 order, Counsel for Complainant objected to the deposition being held in the offices of counsel for Respondent on several grounds, which included his representation that Complainant objected to being held prisoner in the twenty-fifth floor of a corporate law firm's offices, that Complainant and his counsel would be required to obtain accommodations that were more expensive in Detroit than in Warren, Michigan, and that Complainant and his counsel would also have to pay to park in downtown Detroit. Additionally, during the conference call, counsel for Complainant argued that the Department of Labor does not adequately protect Whistleblowers because of departmental desuetude. Counsel for Complainant urged the undersigned to provide a reasonable accommodation to himself and Complainant. Counsel for Complainant has frequently cited to *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB September 27, 1996) and referenced the ADA when requesting a reasonable accommodation. Notwithstanding the representations made by counsel for Complainant regarding the ruling in *Seater*, during the August 28, 2003 conference call, the Administrative Review Board on remand in *Seater* simply directed that "the manner in which [a witness who was critically ill]'s testimony is taken on remand must accommodate [the witness'] physical condition at that time. Prior to scheduling of a deposition or a supplemental hearing, Seater must provide medical evidence concerning [the witness'] *current* physical condition and any medically imposed restrictions pertinent to the taking of [the witness'] testimony. Based on the information provided, the ALJ then must issue an appropriate order concerning the conditions under which discovery, if appropriate, will be

conducted and [the witness] testimony will be taken." Obviously, the ARB did not order the administrative law judge to make any specific accommodations, rather, based on medical evidence regarding the witness' current physical condition, the administrative law judge was to devise and appropriate accommodation to allow the witness to provide testimony. It is of notable distinction that the ARB's ruling in *Seater* concerned a witness with a critical illness. Here, counsel for Complainant is requesting accommodations for himself and Complainant based on financial concerns. Neither counsel for Complainant nor Complainant himself purport to be suffering from a critical illness. Moreover, Complainant is the one responsible for prosecuting his claim; he is not simply a witness. It is also notable that the ARB in *Seater* declared that reliance on the ADA was misplaced, noting that access for handicapped individuals to Federal agency proceedings is provided for by Section 501 of the Rehabilitation Act of 1973, as amended, 29, U.S.C. § 791.

[3] Complainant's motion to bifurcate the hearing was submitted after the deadline set by the undersigned for the filing of motions prior to the hearing.

[4] In the August 28, 2003 prehearing conference, the undersigned admonished counsel for Complainant concerning his failure to notify counsel for Respondent in a timely manner of the death of his father on or about August 11, 2003 and his apparent inability to attend Complainant's deposition on August 19, 2003. Counsel for Complainant apparently misunderstood the undersigned's remark that a professional must sometimes work through their grief to meet their higher level of responsibility. The remark was not directed at Complainant. The undersigned's comments to counsel for Complainant were predicated on counsel for Complainant's apparent failure to effectively notify Respondent regarding the status of the August 19, 2003 deposition. It was not meant to derogate Complainant nor his counsel. In fact, the undersigned and counsel for Respondent expressed sympathy to counsel for Complainant on the death of his father.

[5] These were appropriate motions to quash, and they would have been granted at the hearing had the complaint not been dismissed.

[6] Pursuant to Complainant's and Respondent's representations in telephone conferences and at the hearing, after August 8, 2003,

Respondent made available for inspection and copying at its offices in Michigan, the documents and materials Complainant requested. The parties had agreed that Complainant would inspect and copy the documents during the week of August 18, 2003, when Complainant was scheduled to be deposed by Respondent, and when Complainant was going to conduct informal interviews of Respondent's non-management employees. Complainant did not attend his deposition that week, nor did he inspect and copy documents, nor did he conduct informal interviews. The only reason given for Complainant's non-appearance during the week of August 18, 2003, was that the father of Complainant's counsel died on August 11, 2003. However, as previously noted, counsel for Complainant was able to submit a twenty-five page motion for partial summary judgment on August 12, 2003.

[7] Complainant submitted to the undersigned a "Certificate of Service" signed and dated by Complainant on August 18, 2003 certifying that "a true and correct copy of the foregoing was served on the following parties by the designated methods listed below . . ." Complainant added, "[p]lease note Mr. Batten and Mr. Slavin have exhibits, however they [sic] not all are marked. Supplemented List (corrected) and Exhibits will be forwarded to Mr. Batten and all parties of record. Any errors are not intentional and the cause is due to Mr. Slavin not being available due to the death of his father. Thank you." The foregoing that Complainant referred to contained Complainant's motion for partial summary judgment and Complainant's exhibits 1-25. At the bottom of Complainant's certificate, he included the following, "* Respondents have exhibits. (will supplement)[.]"

[8] A delay of several minutes occurred at this time.

[9] This pause lasted for several minutes. During the proceeding, there were several pauses and interruptions from counsel for Complainant, which caused delays in the proceeding.

[10] Again, this pause lasted for several minutes.

[11] By this point, it was evident to the undersigned that Complainant was not prepared to begin the hearing. Counsel for Respondent stated that he did not have a marked coy of Complainant's exhibits. Meanwhile, in the rear of the courtroom, Complainant was engaged in a process of

removing documents from one of four-to-six plastic file drawers, placing an exhibit cover sheet on top, numbering the pages, and passing them to counsel for Complainant.

[12] The undersigned considers this to be an unwarranted personal attack, not only on the undersigned, but also on this Court.

[13] The Tenth Circuit Court of Appeals employs an identical test when reviewing a district court's decision to dismiss. *See Ehrenhaus* v. *Reynolds*, 965 F.2d 916, 918 (10th Cir.1992); *see also Gripe v. City of Enid, Okl.*, 312 F.3d 1184, 1188.

[14] There are several examples of frivolous motions filed by Complainant that wasted the time and resources of the undersigned and his staff. The most obvious example was "Complainant's Motion In Limine 1-10". At the end of the motion, Complainant stated "[t]hese motions should not be necessary but have the effect of restating reasonable expectations of probity applicable to administrative hearings." The ten items Complainant sought to preclude from admission into evidence were actually ten actions that Complainant presumptively sought to bar Respondent from engaging in, despite the absence of any indicia that Respondent had or would engage in such activity. Earlier in the proceedings, Complainant filed motions entitled, "Motion for a Protective Order for Simultaneous Exchange of Discovery Responses," "Motion to Correct the Record," and a "Motion for Default Judgment" seeking adverse inferences and preclusion orders based on Complainant's assertion that Respondent failed to answer the undersigned's prehearing order. In addition to frivolous motions, Complainant repeatedly submitted documents entitled "Complainant's Notice of Filing of Correspondence," attached to which were letters from Complainant's counsel to counsel for Respondent.

UNITED STATES DEPARTMENT OF LABOR
Offices of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

September 18, 2003

Case No. 2003-BLA-6

MARK E. HOWICK,
Complainant,

v.

CAMPBELL-EWALD COMPANY,
Respondent.

ORDER DIRECTING PARTIES TO SUBMIT BRIEFS

This matter arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. § 31105, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules. This matter is before me on Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor Occupational Safety and Health Administration ("OSHA") after investigation of the complaint. 49 U.S.C. § 31105(b)(2)(A), 29 C.F.R. § 1978.105.

As the parties were informed during the prehearing conference on September 8, 2003 and during the hearing on September 9, 2003, the undersigned is considering assessing

sanctions against Respondent for actions and inactions during the discovery period of this matter. The parties are directed to submit a memorandum to the udersigned addressing the issue of whether or not sanctions should be imposed upon Respondent.[12] Reply briefs may be filed on or before October 20, 2003. Therefore,

IT IS ORDERED the parties submit briefs to the undersigned by October 9, 2003 that address the issue of whether or not sanctions should be imposed on Respondent. Reply briefs may be filed on or before October 20, 2003.

s/s THOMAS F. PHALEN, JR.
Administrative Law Judge

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[12] This is a matter which shall be considered separate and distinct from the sanction issued against Complainant at the September 9, 2003 hearing, and as set forth in the undersigned's Recommended Decision and Order - Dismissal of Complaint issued on September 18, 2003.

UNITED STATES DEPARTMENT OF LABOR
Offices of Administrative Law Judges
36 E. 7th Street, Suite 2525
Cincinnati, Ohio 45202

Issue Date: 25 September 2003

Case No. 2003-STAA-6

MARK E. HOWICK,
Complainant,

v.

CAMPBELL-EWALD COMPANY,
Respondent.

ORDER DENYING COMPLAINANT'S POST-HEARING MOTIONS and *SUA SPONTE* ORDER VACATING AUGUST 18, 2003 ORDER ON SANCTIONS AND DIRECTING PARTIES TO SUBMIT BRIEFS

This matter arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. §§ 2305, and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the STAA provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

The undersigned issued a recommended decision and order - dismissal of complaint on September 18, 2003. That same day, the undersigned issued an order directing the parties to submit briefs on the issue of whether or not sanctions should be assessed against Respondent. In the recommended

decision and order, the undersigned found that the documents filed by Complainant on September 17, 2003 were premature.[1]

The documents submitted by Complainant on September 17, 2003 were: (1) a letter entitled "MR. MARK E. HOWICK'S REQUEST FOR SUBPOENAS, MOTION TO ORDER *IN CAMERA* REVIEW AND IMPOUND DOCUMENTS, MOTION FOR LEAVE OF COURT TO FILE MOTION TO RECONSIDER SEPTEMBER 9, 2003 ORDER DISMISSING FOR "FAILURE TO PROSECUTE", AND COMPLAINANT'S SUGGESTION OF *SUA SPONTE* JUDICIAL RECUSAL."; (2) COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT AGAINST CAMPBELL-EWALD; (3) DECLARATION OF MARK E. HOWICK; (4) A suggested order of default judgment to be entered against Respondent; and (5) two subpoena *duces tecum*. The undersigned stated that Complainant may re-file the documents in response to the decision and order, file new documents responsive to the decision and order, or avail himself of any action to which he is legally entitled.

On September 20, 2003, Complainant submitted to the undersigned a facsimile of a document entitled "COMPLAINANT MR. MARK E. HOWICK'S [sic] RENEWED REQUEST FOR SUBPOENAS, MOTION TO ORDER *IN CAMERA* REVIEW AND IMPOUND DOCUMENTS, MOTION FOR LEAVE OF COURT TO FILE MOTION TO RECONSIDER SEPTEMBER 9, 2003 ORDER DISMISSING FOR "FAILURE TO PROSECUTE", AND COMPLAINANT'S SUGGESTION OF *SUA SPONTE* JUDICIAL RECUSAL [sic] 2. NOTICE OF FILING OF SEPTEMBER 19, 2003 OSHA COMPLAINT [sic] 3. RESPONSE TO C-E MOTION FOR ILLEGAL "GAG ORDER" [sic] 4. REQUEST TO DISCLOSE INDEX OF FILINGS, ANY *EX PARTE* CONTACTS, AND WHETHER C-E EVER FILED HIS DEPOSITION."

29 C.F.R. § 1978.100(b) defines the purpose and scope of the STAA, stating that 29 C.F.R. part 1978 and 29 C.F.R. part 18 set forth the procedures for submission of complaints under section 405, investigations, issuance of findings and preliminary orders, objections thereto, litigation before administrative law judges, post-hearing administrative review, withdrawals and settlements, judicial review and enforcement, and deferral to other forums. In turn, 29 C.F.R. § 18.1, which identifies the scope of the rules of practice and procedure for administrative hearings before the office of the administrative law judges, states that the "Rules of Civil Procedure for the District of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation."

Complainant did not re-file his motion for a default judgment, thus, it will not be considered. Since Complainant's claim has been dismissed through the undersigned's recommended decision and order dated September 18, 2003, Complainant's request for subpoenas and his motion to order *in camera* review and impound documents are dismissed as moot.[2] With regard to Complainant's motion for leave of court to file motion to reconsider September 9, 2003 order dismissing for failure to prosecute, the undersigned stated in the September 18, 2003 recommended decision and order - dismissal of complaint that Complainant may avail himself of any action to which he is legally entitled. That directive has not changed.[3]

Complainant's suggestion for *sua sponte* judicial recusal is denied. If Complainant's "suggestion" was intended to be a motion for disqualification of the undersigned, it is denied since it does not comply with 29 C.F.R. § 18.31(b). The undersigned does not deem himself disqualified to preside over this particular proceeding, therefore, he will not withdraw from this proceeding. *See* 29 C.F.R. § 18.31(a).

Remaining for resolution is Complainant's request to disclose index of filings, any *ex parte* contacts, and "whether C-E ever filed his deposition." At the end of Complainant's letter, Complainant requests that the undersigned: "(a) serve the parties with copies of a complete computer printout of the DOL OALJ computer index (now or formerly known as System 10 and 11) of all filings in 2003-STAA-6 case, (b) kindly state whether Respondent Campbell-Ewald ever filed Mr. Howick's deposition, as promised, and (c) make a full disclosure of any *ex parte* contacts, whether by any DOL employee or any other person, firm, or organization. *See* Cinderella Career & Finishing Schools v. FTC, 435 F.2d 563, 591-592 (D.C. Cir. 1970)."[4] The pages of *Cinderella* to which Complainant cites discusses the issue of disqualification regarding the former chairman of the Federal Trade Commission after he made public statements that indicated his prejudgment of the matter before him. The District of Columbia Circuit Court's decision in *Cinderella* does not provide any support for Complainant's requests that the parties be served with copies of a computer printout, a statement on whether Complainant's deposition was filed by Respondent, nor a full disclosure of any *ex parte* contacts. Complainant has not identified any statute or case law as grounds for his request. However, the undersigned has attached to this order a copy of a printout of the record of all filings received by the undersigned in this matter. Respondent filed Volume I of Complainant's deposition at the hearing on September 9, 2003. Since Complainant's request to "make a full disclosure of any *ex parte* contacts, whether by any DOL employee or any other person, firm, or organization" is a vague and ill-defined request, the request is denied.[5]

At the hearing, the undersigned informed that parties that he was considering as a separate matter the issue of whether sanctions should be assessed against Respondent arising out of the discovery process. On September 18, 2003 the undersigned issued an order directing the parties to submit briefs on that issue. Upon further review and reflection, the undersigned hereby, *sua sponte*, vacates that order. The undersigned will not issue sanctions against Respondent. Complainant alleges that Respondent did not produce a large volume of documents that had been requested until September 4, 2003. Further, Complainant alleges that Respondent only allowed Complainant two-hours to inspect and copy the "two tons of documents." Through an agreement of the parties reached during an July 25, 2003 conference call with the undersigned, the parties agreed that Complainant would be deposed during the week of August 18, 2003. The parties also agreed that Respondent would make available to Complainant all documents that Complainant had requested. However, Complainant failed to attend his deposition, foregoing his opportunity to review and inspect the documents that he requested at that time. Additionally, Complainant never availed himself of the right to file a motion to compel the production of documents as provided 29 C.F.R. § 18.21. The undersigned is no longer considering sanctions against Respondent. Therefore,

IT IS ORDERED that:

1. Complainant's motion to order *in camera* review and impound documents is DENIED;

2. Complainant's motion for leave of court to file a motion for reconsideration is not ruled upon, and Complainant is again admonished that he is entitled to avail himself of any right to which he is legally entitled;

3. Complainant's suggestion of *sua sponte* judicial recusal is denied to the extent his suggestion acts as a motion;

4. Complainant's request to disclose index of filings is GRANTED, and Complainant's request to disclose any *ex parte* contacts and whether Respondent ever filed "his" deposition is DENIED; and

5. The undersigned's August 18, 2003 order directing the parties to brief the issue of sanctions against Respondent is hereby VACATED, and any statements by the undersigned at the hearing that sanctions would be imposed against Respondent are hereby withdrawn.

THOMAS F. PHALEN, JR.
ADMINISTRATIVE LAW JUDGE

[ENDNOTES]

[1] Complainant's filings were deemed premature through no fault of Complainant. Rather, the undersigned inadvertently referred to the his order of dismissal as a "final" order instead of a "recommended" order. Complainant's post-hearing motions were filed in response to the stated final order.

[2] Complainant alleged that the deposition subpoenas are "in support of the Court's Order for briefing on remedial sanctions against Respondents . . ."

[3] Complainant alleged that the undersigned illegally ordered that Complainant not file a motion for reconsideration. A review of the transcript from the hearing reviews no such "illegal" order.

[4] The case found at 435 F.2d 563 is *Domtar Newsprint Sales Ltd. v. U.S.*, 435 F.2d 563 (Ct. Cl. 1970) which is an action seeking recovery of income tax that had been paid. The matter of *Cinderella Career & Finishing Schools, Inc. v. F.T.C.* is found at 425 F.2d 583 (D.C. Cir. 1970).

[5] The undersigned is not aware of any *ex parte* communications made by himself or any member of his staff in violation of 29 C.F.R. § 18.38 in this matter. Strictly interpreted, 29 C.F.R. § 18.38 exempts only requests for extensions of time. It is the practice of the undersigned to not speak to parties or their representatives *ex parte*, except in circumstances of emergency or dire necessity. The undersigned's staff is permitted to discuss various procedural matters, but not to give legal advice or to discuss the subject matter of the case.

SURFACE TRANSPORTATION ASSISTANCE ACT (STA) 49 U.S.C. § 31105 (a)(1)(B).

The "whistleblower" portions of the STAA provide as follows: § 31105. Employee Protections

(a) Prohibitions. – (1) A person may not discharge an employee, or discipline, or discriminate against an employee regarding pay, terms, or privileges of employment because –

(A) the employee, or another person at the employee's request has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

(B) the employee refuses to operate a vehicle because – (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health…(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

An employee who believes that he has been retaliated against for engaging in an activity protected under the STAA may file a complaint with the U. S. Department of Labor. 49 U.S.C. § 31105 (b). OSHA investigates and orders relief if it

finds reasonable cause to believe that the STAA has been violated. 49 U.S.C. § 31105 (b)(2)(A). Either the employee or the employer, may object to OSHA'S findings and request a de novo hearing before an ALJ of the Department. 49 U.S.C. § 31105 (b)(2)(B). After an ALJ issues a recommendation decision, the parties may submit briefs to the Board. 29 C.F.R. § 1978.109(c)(1).

If the Board determines the employer has violated the STAA, it orders appropriate relief, which may include reinstatement, back pay, compensatory damages, and attorney fees and costs. 49 U.S.C. § 31105 (b)(3).

Pertinent Procedural Rules - 29 C.F.R. Part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges

§ 18.6 - Motions and Requests.

(d) Motion for order compelling answer: sanctions.

(1) A party who has requested admissions or who has served interrogatories may move to determine the sufficiency of the answers or objections thereto. Unless the objecting party sustains his or her burden of showing that the objection is justified, the administrative law judge shall order that an answer be served. If the administrative law judge determines that an answer does not comply with the requirements of these rules, he or she may order either that the matter is admitted or that an amended answer be served.

(2) If a party or an officer or agent of a party fails to comply with a subpoena or with an order, including, but not limited to, an order for the taking of a deposition, the production of documents, or the answering of interrogatories, or requests

for admissions, or any other order of the administrative law judge, the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not limited to the following:

(i) Infer that the admission, testimony, documents or other evidence would have been adverse to the non-complying party;

(ii) Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the non-complying party;

(iii) Rule that the non-complying party may not introduce into evidence or otherwise rely upon testimony by such party, officer or agent, or the documents or other evidence, in support of or in opposition to any claim or defense;

(iv) Rule that the non-complying party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence should have shown.

(v) Rule that a pleading, or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both.

§ 18.7 - Prehearing Statements.

(a) At any time prior to the commencement of the hearing, the administrative law judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party or parties on whose behalf it is presented and shall briefly set

forth the following matters, unless otherwise ordered by the administrative law judge:

(1) Issues involved in the proceeding;

(2) Facts stipulated pursuant to the procedures together with a statement that the party or parties have communicated or conferred in a good faith effort to reach stipulation to the fullest extent possible;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusion to be drawn;

(7) Suggested time and location of hearing and estimated time required for presentation of the party's or parties' case;

(8) Any appropriate comments, suggestions or information which might assist the parties in preparing for the hearing or otherwise aid in the disposition of the proceeding.

29 C.F.R. § 18.8 - Prehearing Conferences.

(a) Purpose and scope.

(1) Upon motion of a party or upon the administrative law judge's own motion, the judge may direct the parties or their counsel to participate in a conference at any reasonable time, prior to or during the course of the hearing, when the administrative law judge finds that the proceeding would be expedited by a prehearing conference. Such conferences normally shall be conducted by conference telephonic communication unless, in the opinion of the administrative law judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance.

Reasonable notice of the time, place and manner of the conference shall be given.

(2) At the conference, the following matters shall be considered:

(i) The simplification of issues;

(ii) The necessity of amendments to pleadings;

(iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;

(iv) The limitation of the number of expert or other witnesses;

(v) Negotiation, compromise, or settlement of issues;

(vi) The exchange of copies of proposed exhibits;

(vii) The identification of documents or matters of which official notice may be requested;

(viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(ix) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) Reporting. A prehearing conference will be stenographically reported, unless otherwise directed by the administrative law judge.

(c) Order. Actions taken as a result of a conference shall be reduced to a written order, unless the administrative law judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the administrative law judge elects to make a statement on the record at the hearing summarizing the actions taken.

§ 18.47 - Exhibits

(a) Identification. All exhibits offered in evidence shall be numbered and marked with a designation identifying the party or intervenor by whom the exhibit is offered.

(b) Exchange of exhibits. When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and one copy to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing, or at the latest at the commencement of the hearing.

(c) Substitution of copies for original exhibits. The administrative law judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

As Presented to the Sixth Circuit:

1. Whether the Board erred in adopting the ALJ's factual findings that Howick failed to prosecute his case? **Standard of Review:** The Board's findings of fact that Howick failed to prosecute his case are reviewed to determine if they are supported by substantial evidence. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

Continued . . .

2. Whether the Board violated Howick's due process rights and abused its discretion when it (a) dismissed Howick's complaint for allegedly failing to prosecute his case; and (b) adopted the ALJ's denial of Howick's request that prehearing conferences be recorded? **Standard of Review:** The Board's dismissal of Howick's complaint for failing to prosecute his complaint is reviewed to determine if there was an abuse of discretion. *Mulbah v. Detroit Bd. of Educ.*, 261 F.3d 586 (6th Cir. 2001)

3. Whether the Board's dismissal of Howick's complaint was motivated by a bias against Howick's former attorney? **Standard of Review:** The ALJ's conduct during the proceeding is reviewed for an abuse of discretion. *Nationwide Mut. Fire Ins. Co. v. Ford Motor Co.*, 174 F.3d 801, 805 (6th Cir. 1999).

4. Whether the Board erred in adopting the ALJ's denial of Howick's request to amend his complaint to include a claim under the Toxic Substance Control Act? **Standard of Review:** The denial of Howick's motion to amend his complaint is reviewed to determine if there was an abuse of discretion. *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir.1987).

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* Cases Cited: Are listed in the Table of Authorities . . .

STATEMENT PURSUANT TO FRAP RULE 35 (a) AND CIR. RULE 35, AND FRAP RULE 40.

Based upon my thorough review of this honorable court's order in my case issued May 03, 2006, it is my judgment with good-faith and reasonable belief that (1) en banc consideration is necessary to secure and maintain uniformity of the court's decisions; and (2) the proceeding involves a question of exceptional importance. I believe the panel's order is contrary to the legal analysis and legal reasoning of the following decisions and precedents of this Court: *Wu, Mulbah, Carter, Knoll, Nationwide, Cox, Hickman,* and ripeness for reconsideration of dissenting opinions in *Link.*

En Banc consideration is necessary to secure and maintain uniformity of this court's decisions. Based upon my due consideration and judgment, I believe that, if this appeal is not governed by the above precedents, then it requires an answer to a precedent-setting question of exceptional importance:

> Should an agency as a matter of law have a "timely" duty to trigger a Notice of Judicial Inquiry and Order to Show Cause into the fitness of an officer of the court, when the agency has prior knowledge and is in possession of convincing evidence of the many other instances of the attorney's history of misconduct and the agency has knowledge of the attorney's "gross incompetence"?

Therefore, this petition meets the rigid standards of FRAP 35(a). Furthermore, this case presents significant issues of paramount importance to serve both public safety and public interest in a post 9-11 era.

Respectfully submitted,
Mark E. Howick
Petitioner, pro se